CORRECTED COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.____, Original

STATE OF LOUISIANA,

Plaintiff,

vs.

CLAUDE CUMMINS, ET ALS.,

Defendant.

MOTION FOR LEAVE TO FILE ORIGINAL COMPLAINT IN UNITED STATES SUPREME COURT AND BRIEF IN SUPPORT THEREOF AND ORIGINAL COMPLAINT.

EUGENE STANLEY,
Attorney General,
State of Louisiana;
JAMES J. MORRISON,
Special Assistant Attorney General;
JAMES J. MORRISON,
Executive Counsel.
Louisiana Crime Commission;
N. HALL MCCORD,
Of Counsel.

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Defendant.

MOTION FOR LEAVE TO FILE ORIGINAL COMPLAINT IN UNITED STATES SUPREME COURT AND BRIEF IN SUPPORT THEREOF AND ORIGINAL COMPLAINT.

Motion for leave to file original complaint in the Supreme Court, within the original jurisdiction of the Supreme Court as provided for by Article III, Section 2, of the Constitution of the United States.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now into Court comes the State of Louisiana, through its Attorney General, Eugene Stanley, and through its Commission created by Act 13 of the Louisiana Legislature of 1940, represented by its Executive Counsel and Special Assistant Attorney General, James J. Morrison, and moves

the Court for leave to file a complaint in the above numbered and entitled cause, in a controversy which has arisen between the said plaintiff, the State of Louisiana, and the said Claude Cummins, and others, defendants, growing out of the illegal, unlawful and fraudulent receipt of public funds by the said defendants under construction contracts illegally and fraudulently procured from agencies of the State of Louisiana, and other acts and things alleged in said complaint, and arising under the Constitution and laws of the United States, for the purpose of allowing the said Court to pass upon the issues; and that proper process may issue thereon notifying the defendants of the filing of said complaint, and requiring that they appear and answer thereto and defend the same.

And your plaintiff, the State of Louisiana, further moves the Honorable Court to appoint a special general master in said cause to take testimony and report the findings of fact and conclusions of law on the issues between the parties, and report the same to the Court, the ground of said motion being that the testimony is voluminous and contains matters of accounting, payments, collections and disbursements, which will make the appointment of such special general master necessary.

Dated, May 26, 1941.

EUGENE STANLEY,
Attorney General, State of Louisiana,
By JAMES J. MORRISON,
Special Assistant Attorney General,
JAMES J. MORRISON,
Executive Counsel, Louisiana Crime Commission.

Washington, D. C.

James J. Morrison, Special Assistant Attorney General of the State of Louisiana, and Executive Counsel of the

Louisiana Crime Commission, being duly sworn, on his oath says that he has read the foregoing motion; that the matters and things therein contained are true both in substance and fact.

—— ——.

Brief on Motion for Leave to File Petition.

As cause for this motion, it is respectfully shown:

1. That this cause involves a controversy between the State of Louisiana and individuals and corporations, citizens and residents of states other than Louisiana. As to these defendants and companies, there can be no question but that the original jurisdiction of the Supreme Court extends to them under the provisions of Article 3, section 2, Clause 2 of the United States Constitution.

2. That the State of Louisiana is the party plaintiff and is the real party in interest appearing herein to protect the public fisc of the State of Louisiana. The power of the State of Louisiana so to appear has been especially upheld by the Louisiana Supreme Court in a number of cases, one of the most recent of which is *State* v. *Walmsley,* 181 La. 597, 160 So. 91 (1935). Moreover the State of Louisiana is especially empowered to maintain a suit for recovery such as the present by Act 13 of the Legislature of 1940 which provides in section 3B:

> "That any of the agents or representatives of the Commission, when specifically authorized by it, and/or the Attorney General, under the Constitution and laws of the State, is vested with the authority, power, and duty to institute and prosecute, or cause to be instituted and prosecuted, civil proceedings in the name of the State of Louisiana, for the recovery and return of * * * any moneys, property or thing of value that may have been fraudulently, unlawfully, or without author-

ity appropriated, diverted, expended or disbursed by, or taken or acquired from the State;

Section 2 of said act defines the word "state" to mean and include "all of the governmental departments thereof, * * * all public boards and commissions * * *." Moreover, Act 44 of the Louisiana Legislature of 1940, the Appropriations Act, provides that the appropriations made in this section shall be paid out of the State General Fund only on condition that there shall be deposited in the State Treasury to the account of the State General Fund all "unincumbered balances" of cash held June 30, 1940. It is apparent that the sums claimed in this suit are "unincumbered balances" which under the provisions of Act 44 of 1940, section 2, revert to the general fund of the State. The fisc of the State of Louisiana is therefore directly interested in a number of ways in the sums sought to be recovered in this case, and, under the *Walmsley* case above referred to, is entitled to prosecute this suit.

3. That this case is of a justiciable character, of a civil nature, and is instituted to enforce the recovery of property due to the State of Louisiana.

4. That this is not a suit to enforce a penalty under the State law, and the nature of the controversy does not call for a judgment on a political or governmental question.

5. That no service of process can be had within the State of Louisiana upon either the corporate or individual defendants (except defendant Shushan) or any of its officers or agents.

6. That most of the witnesses necessary to the proof of the claims asserted herein are beyond reach of the State of Louisiana.

7. That the complaint stated against Abraham L. Shushan is completely severable from the complaints stated against

the other defendants in this case. That the suit can be carried on and successfully prosecuted against the defendants other than Abraham L. Shushan even should it become necessary in order to maintain the original jurisdiction of the United States Supreme Court to dismiss this case as against said Abraham L. Shushan. That if, however, the State of Louisiana is forced to dismiss this suit as against Abraham L. Shushan in order to maintain it against the other defendants herein, the State of Louisiana will be put to the trouble, expense, and complete duplication of effort in bringing another and separate suit against Shushan on precisely the same facts and issue and requiring precisely the same evidence and proof as must be adduced in the case at bar against the other defendants. The United States Supreme Court has asserted original jurisdiction in suits by states against citizens of other states wherein citizens of the plaintiff states have been joined as co-defendants in a separable controversy. The attention of the Court is called particularly to the case of *Ohio* v. *Helvering*, 292 U. S. 360, 78 L. Ed. 1307, 54 S. Ct. 725 (1934), in which the Court assumed jurisdiction and decided the case on its merits where such circumstances were present. Indeed, this is the universal rule in the Federal district courts under the Act of March 3, 1875, title 28, of the Judicial Code; 28 U. S. C. A. § 71. See *Barney* v. *Latham*, 103 U. S. 205, 26 L. Ed. 514 (1884); *Geer* v. *Mathieson Alkali Works*, 190 U. S. 428, 47 L. Ed. 1122, 23 S. C. 807 (1902); *Gainesville* v. *Brown-Crummer Co.* 277 U. S. 54, 72 L. Ed. 781, 48 S. C. 454 (1927). In the cases earlier than *Ohio* v. *Helvering, Supra*, involving the original jurisdiction of the United States Supreme Court the citizen of the State attempting to invoke such original jurisdiction was invariably an indispensable party. See *Pennsylvania* v. *Quicksilver Mining Co.*, 10 U. S. 553, 19 L. Ed. 998 (1870); *California* v. *Southern Pacific Company*, 157 U. S. 229, 39 L. Ed. 683, 15 S. C. 591 (1895); *New Mexico*

v. *Lane*, 243 U. S. 52, 61 L. Ed. 588, 37 S. C. 348 (1919). The dissenting opinion of Mr. Justice Harlan, concurred in by Mr. Justice Brewer in *California* v. *Southern Pacific Company*, which, as pointed out above, involved an indispensable party, cogently states the considerations involved in the United States Supreme Court accepting jurisdiction in cases such as the case at bar. Mr. Justice Harlan said:

> "It seems to me that according to both the letter and the spirit of the Constitution this court cannot refuse to exercise its original jurisdiction over a controversy between a State and a citizen of another State, because a citizen of the plaintiff State has or may assert some interest in the subject-matter of that controversy; and that in such a case it is our duty either to permit the latter citizen to be heard without becoming a party of record if thereby our jurisdiction would be defeated, or proceed to a decree between the original parties to the controversy, leaving unaffected, in law, the rights of others.
>
> Our constitutional duty is to determine the 'case' in which the State is a party, taking care to give all who are interested in its determination a reasonable opportunity to produce evidence and to be heard in support of their rights. In this way only can we give full effect to the Constitution, and at the same time attain the ends of justice, unembarrassed by mere forms. We should not impose undue restrictions upon the right of the States to invoke our original jurisdiction. Jurisdiction to determine *all* cases to which the judicial power of the United States extends, in which a State is a party, gives authority to decide every controversy that arises in such cases, the determination of which is either necessary or proper in order to dispose of the case in which it arises.
>
> If this be not a sound interpretation of the Constitution, the result will be that this court will not, in any case, exercise its original jurisdiction over a case 'between two or more States,' if it appears that individual citizens have an interest in its determination. A

controversy capable of judicial solution may arise between two States, and it may be important to the peace of those States, indeed, of the whole country, that it should be determined by this court. But, under the interpretation of the Constitution adopted in this case, our jurisdiction cannot be invoked in any mode for its final settlement if it appears in evidence that some individual or corporation is interested in that settlement. Still more, although this court is given original jurisdiction of a case between one of the States of the Union and a foreign State, it will not exercise it even in such a case if individual parties are interested in the controversy * * *.

Under the ruling now made, how is the State of California to obtain a judicial determination of the controversy between it and this foreign corporation? It is said that a suit may be brought in one of its own courts against all persons asserting an interest in the property rights here in question. The effectiveness of such a suit would depend upon the ability of the State to bring the Kentucky corporation into court, so that it would be bound by the final decree. It may be that that corporation does business in California under the condition, among others, that it will have an agent there upon whom process can be served. But surely the duty of this court, under the Constitution, to exercise its original jurisdiction in respect to a controversy between a State and a corporation of another State can not depend upon the question whether the plaintiff State can compel that corporation to answer in its own courts. Suppose the defendant is an individual citizen of another State who cannot be served with process in the State desiring to bring suit against him. In such a case, the State must, under the principles now announced, be without a remedy for the protection of its rights, or it will be driven to sue its adversary in the courts of his own State, whose decision will be final, unless the controversy happens to involve some question of a Federal nature; and even then this court could only decide the Federal question presented, and must accept the decree of the state court as conclusive upon

all other questions. The State could not sue in any Circuit Court of the United States, for that court has no jurisdiction under the acts of Congress of a suit brought by a State against a citizen of another State, unless perhaps such suit be one arising under the Constitution or laws or treaties of the United States. The framers under any circumstances, to the indignity of being compelled to submit its controversies with citizens of other States to the courts of such other States. They opened the doors of this court to every State having a cause of action against a citizen of another State. In my judgment, we have no right to refuse a hearing to a State having such a cause of action, because of the circumstance that one or more of its people assert an interest in the subject-matter of its controversy with the defendant citizen of another State."

WHEREFORE, the complainant prays that this Honorable Court may exercise its original jurisdiction in this controversy as provided in the Constitution of the United States, Article 3, Section 2, Clause 2, and in the Judicial Code, Section 233 (28 U. S. C. A., 341).

EUGENE STANLEY,
Attorney General,
State of Louisiana,
JAMES J. MORRISON,
Special Assistant Attorney General;
JAMES J. MORRISON,
Executive Counsel,
Louisiana Crime Commission;
N. HALL MCCORD,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No.____, Original

THE STATE OF LOUISIANA,

Complainant,

vs.

CLAUDE CUMMINS, CLARENCE R. BIRCH, DREDGING REALIZATION CORPORATION OF NEW JERSEY, STANDARD DREDGING CORPORATION OF NEW JERSEY AND ABRAHAM L. SHUSHAN,

Defendants.

BILL OF COMPLAINT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

I. The complainant, the State of Louisiana, one of the United States of America, respectfully shows this Honorable Court that this complaint is brought by and on behalf of the State of Louisiana through its Attorney General, Eugene Stanley, and through its Commission created by Act 13 of the Louisiana Legislature of 1940, represented by its Executive Council and Special Assistant Attorney General, James J. Morrison, and thereupon shows the Court and alleges as follows:

Jurisdiction.

II. The defendant, Claude Cummins, is a citizen of the State of California and a resident of the City and State of New York; the defendant Clarence R. Birch is a resident and citizen of the State of New York; the defendant Dredging Realization Corporation is a corporation organized and existing under the laws of the State of New Jersey and a citizen thereof with its principal place of business located in the City of New York; the defendant, Standard Dredging Corporation, is a corporation organized and existing under the laws of the State of New Jersey and a citizen thereof, with its principal place of business located in the City of New York; the defendant, Abraham L. Shushan is a resident and citizen of the State of Louisiana.

III. This complaint is brought in the Supreme Court of the United States in the exercise of its original jurisdiction under Article III, Section 2, Clause 2 of the Constitution of the United States, on the ground that the complaint relates to a controversy between the State of Louisiana and citizens of other states in a separable controversy in which Abraham L. Shushan appears as a co-conspirator, said Abraham L. Shushan not being a necessary or indispensable party to the complaint herein against the other defendants, the complaint being dismissable as to him without in any way affecting this proceedings against the other parties thereto.

The Corporate Structure.

IV. The Board of Levee Commissioners of the Orleans Levee District (hereinafter called the Levee Board) is an agency of the State of Louisiana created by Act 93 of the Louisiana Legislature of the year 1890 and acts amendatory

thereto. The defendant, Abraham L. Shushan, became a member of the Board of Levee Commissioners of the Orleans Levee District on August 8, 1928 and was elected President on June 11, 1929, serving continuously as President thereof until his resignation November 14, 1935, which term included all of the acts and things complained of herein.

V. The acts hereinafter complained of arise with relation to a certain contract, attached hereto, for public works between the Levee Board and a corporation, since dissolved, known as Orleans Dredging Company, Inc. Complainant shows that the Orleans Dredging Company, Inc., a Louisiana corporation, was a wholly-owned subsidiary of Standard Dredging Company, a New Jersey corporation. Complainant further shows that on May 5, 1937 an agreement of merger and consolidation was filed with the Secretary of State of the State of New Jersey, whereby as of September 1, 1937 the name of the Standard Dredging Company was changed to that of the Standard Dredging Corporation, and the agreement of merger and consolidation hereinabove referred to further provided that the Standard Dredging Corporation assumed the liabilities of the Standard Dredging Company. The hereinabove mentioned agreement of merger and consolidation further provided that the Standard Dredging Corporation would thereupon become the owner of all of the capital stock of the defendant, Dredging Realization Corporation which corporation at one time owned all of the stock of the Orleans Dredging Company, Inc., and which said Orleans Dredging Company had, at the time of the acts complained of herein, as its officers, Claude Cummins, President and Clarence R. Birch, Assistant Secretary, who were also officers and directors of the other corporations named herein. Complainant avers that the Orleans Dredging Company, Inc., was in truth and in fact nothing more than a "dummy corporation"—a mere

sham or a cloak under which the parent corporation, Standard Dredging Company, and their directors operated in the State of Louisiana. Complaints show that during all of the time complained of herein, the defendants, Claude Cummins, and Clarence R. Birch and, until the time of his death in June of 1932, R. A. Perry, were the principal officers and directors, composing an interlocking directorate, of the corporations named above, and carried on the active management of their affairs. Complainant further shows that the accounts, obligations, funds and credits, particularly of Orleans Dredging Company, Inc. and Standard Dredging Company, were co-mingled indiscriminately, and funds and payments interchanged regardless of dividend declarations, upon the instructions of said R. A. Perry, and of defendants Cummins and Birch. Complainants therefore aver that the acts of Orleans Dredging Company, Inc. are the acts of Standard Dredging Company of New Jersey and Dredging Realization Corporation, defendant herein, and that the latter are responsible therefore to the same extent as if done by it or them. Complainants further show that all of the liabilities, debts, and obligations of said Standard Dredging Company, including the liability herein sought to be imposed, were expressly assumed by the Standard Dredging Corporation by virtue of the merger agreement referred to above. A photostatic copy of documents filed with the Securities and Exchange Commission by the Standard Dredging Corporation showing said merger agreement is attached hereto and made a part hereof and marked "Plaintiff 1" for identification.

The Airport Fill.

VI. Complainants show that by an amendment to the Louisiana Constitution adopted in 1930 (Art. 16, Sec. 76) the Levee Board was authorized and empowered to construct an airport on the shores of Lake Pontchartrain and

within the city limits of the City of New Orleans; that the construction of such an airport at the place selected involved the filling of a large area which was then swamp or covered by water, with approximately 6,479,780 cubic yards of earth fill. Complainants show that at a meeting of the Levee Board held February 21, 1931, copy of an extract from the minutes of which meeting is attached hereto and made a part hereof, and marked for identification "Plaintiff 2", Abraham L. Shushan, President of the Levee Board, recommended and urged upon the Levee Board, and, as a result thereof, was authorized by the Levee Board, to enter into a contract with the Orleans Dredging Company, Inc. for hydraulic fill for said airport at a price and sum of 13.9 cents per cubic yard for such fill. Complainants further show that on March 6, 1931, Abraham L. Shushan, on behalf of the Levee Board, did enter into and sign such a contract with the Orleans Dredging Company, Inc. at the price and sum aforesaid, as will more fully appear from a copy of the contract which is attached hereto and made a part hereof and marked for identification "Plaintiff 3". Complainants further show that, pursuant to said contract, the Levee Board paid out to the Orleans Dredging Company, Inc., or its assignees, the total sum of some $904,456.42 of the public monies of the State of Louisiana.

The Conspiracy.

VII. Complainants further show that, prior to February 21, 1931, the date of the meeting above referred to, and of the confection of the contract with the Orleans Dredging Company, Inc., the defendant Abraham L. Shushan, President of the Levee Board, and R. A. Perry (now deceased) then either President or a managing director of the Orleans Dredging Company, Inc. and of the Standard Dredging Company of New Jersey, with the full knowledge, consent and acquiescence of the defendants Cummins and Birch,

both of whom were managing officers and directors of both corporations, did all wrongfully, illegally, and fraudulently conspire together, and concoct and devise a scheme and artifice to defraud and to obtain money by fraudulent means and did defraud and obtain money by fraudulent means from the Levee Board and the complainant State of Louisiana and the taxpayers thereof, by illegally, fraudulently and wrongfully obtaining from the Levee Board the above-mentioned contract for the hydraulic fill of the said airport, to the unlawful advantage and enrichment of all of the defendants herein, of the Orleans Dredging Company, Inc., and Standard Dredging Company, and of R. A. Perry (now deceased); that as a part of said conspiracy to defraud, defendant Abraham L. Shushan, as President of the Levee Board, would and did submit and urge upon and influence the Levee Board to accept, and did use and assert his prerogatives and the influence and suasion of his office as President thereof to have the Board accept, the offer made through the Orleans Dredging Company, Inc. to supply the hydraulic fill at a price of 13.9 cents a cubic yard; that as a further part of said conspiracy to defraud, defendant Abraham L. Shushan, as President of the Levee Board, would and did urge and influence the Levee Board, and assert his influence and the authority and suasion of his office to persuade said Levee Board, from advertising said contract for public competitive bids, as required by the express law of the State of Louisiana under such circumstances, and this even although the President and the Board were informed and had reason to believe that advertising for such competitive bids would result in obtaining responsible bids lower than 13.9 cents per cubic yard of fill (see "Plaintiff 2" attached); that as a further part of said conspiracy to defraud, the said Abraham L. Shushan, as President of the Levee Board, did represent falsely, fraudulently and untruthfully, that the contract to be entered into

with the Orleans Dredging Company, Inc., was a renewal of an earlier contract, whereas in truth and in fact it was an entirely new and utterly different contract; that the said Abraham L. Shushan did fraudulently, illegally, unlawfully and immorally do and perform the above acts and things, and influence the Levee Board in other and different ways to authorize him to sign said contract, and did sign said contract, to the detriment and disadvantage of the Levee Board, all in consideration of a bribe which the said R. A. Perry (now deceased) offered, on behalf of himself and of the other defendants herein, and of the Orleans Dredging Company, Inc., and the Standard Dredging Company of New Jersey, to Abraham L. Shushan, of two cents (2¢) per cubic yard on every cubic yard of hydraulic fill placed upon said airport, which said bribe was paid in the manner hereinafter more particularly described, and which amounted to more than the sum of One Hundred Thirty Thousand Five Hundred ($130,500.00) Dollars.

The Bribe.

VIII. Complainant shows that the above bribe was paid to the said Abraham L. Shushan in installments and charged against fraudulent and fictitious accounts of the Standard Dredging Company of New Jersey, and paid in cash to the said Abraham L. Shushan by intermediaries out of funds forwarded to the Standard Dredging Company of New Jersey by the Orleans Dredging Company, Inc. which it had in turn received from the Levee Board. At least two such payments were made before the death of R. A. Perry, and the remaining payments were made after his death pursuant to a verbal agreement between Shushan and Cummins, with the knowledge and consent of Birch, that the payments of the bribe would be continued at the same rate of 2¢ per cubic yard. In two instances the installments on the bribe were paid by the Standard Dredging Company

of New Jersey to Shushan in bonds of the Levee Board which had previously been surrendered by it as installment payments on account of the contract to the Orleans Dredging Company, Inc. The amounts and dates of such payments, and the fictitious accounts on the books of the Standard Dredging Company to which they were charged, all at the direction of defendants Cummins and Birch, and, until his death, Perry, are as follows:

Date	Amount	Charge
1/14/32	$10,000	Mexico
1/16/32	10,000	——
12/ –/32	49,000 (Bonds)	Payment made account commissions and engineering expense on proposed dredging contract at Barcelona, Spain
2/11/33	1,500	——
6/ 3/33	5,000	Ellen
7/22/33	5,000	——
8/ 5/33	5,000	Mexican General Expense Commissions
10/ –/33	35,000 (Bonds)	Mexican General Expense
	$120,500 Total	

At least one additional payment of ten thousand ($10,000) dollars paid by Perry to Shushan before his death is not recorded in the above tabulation.

The Illegality of the Contract.

IX. Complainant shows that Act 73 of the Legislature of Louisiana of 1926 provides, among other things, as follows:

> "• • • all public work to be done, exceeding the sum of five hundred dollars by any parochial, municipal, or other public corporation or political subdivision of the state, • • • shall be advertised and let by contract to the lowest responsible bidder. • • • that the procedure herein shall not be necessary in cases

of extreme public emergency. * * * any contract entered into for the construction of public works, contrary to the provisions of this act shall be null and void."

Complainant further shows that the contract herein for the construction of hydraulic fill for the Orleans Airport substantially exceeded the sum of five hundred dollars; was let and entered into as a part of the conspiracy and upon the recommendation and persuasion of Abraham L. Shushan without advertising, without competitive bidding or the opportunity therefor in the absence of any "extreme public emergency", and without the other safeguards and formalities required by law for the protection of public works contracts; and was so let secretly, surreptitiously, and clandestinely, for the express purpose of shutting out lower and competitive bids, as will more completely appear from the excerpt of the minutes of the Levee Board attached hereto and made a part hereof and marked "Plaintiff 2". Complainant shows that the contract is, therefore, utterly and completely null and void *ab initio.*

X. Complainant further shows that the officers and directors of the Orleans Dredging Company, Inc., and of the parent corporation, Standard Dredging Company of New Jersey, and particularly R. A. Perry, and the other individual defendants herein, knew that said contract was let without advertisement and without competitive bidding or the opportunity therefor, and without compliance with the other safeguards and formalities required by law for the protection of public works contracts; and complainants further show that it was a part of the illegal, unlawful, fraudulent and immoral conspiracy set out above that Abraham L. Shushan procure for the Orleans Dredging Company, Inc., this contract at the price of 13.9 cents per cubic yard of fill without advertisement or competitive bids, and in

an unlawful and illegal manner. Complainant moreover shows that this price of 13.9 cents per cubic yard for fill was based upon an offer of that price in a bid submitted in 1929 by the Orleans Dredging Company, Inc., in connection with a different contract from that involved herein; that the price was based upon conditions existing in the year 1929, at which time labor and materials were at their peak prices; that the procurement in the unlawful and fraudulent fashion above set forth of the contract for hydraulic fill in 1932 at a time when prices for labor and materials had become drastically reduced and depressed as a result of world-wide economic conditions resulted in obtaining said contract at a grossly excessive and unreasonable price, all of which was well known to the defendants herein and wilfully and maliciously contemplated by them.

The Excessive Profits on the Contract.

XI. Complainant shows that as a result of the illegal and unlawful manner in which the contract was entered into, and the secret, clandestine, and surreptitious manner in which it was confected, and as an integral part of the conspiracy herein disclosed, gross, excessive, and unconscionable profits were reaped by the defendants herein through the Orleans Dredging Company, Inc., to the detriment of the plaintiff herein. Complainants further show that the complete cost of the operations to the Orleans Dredging Company, Inc., could not have exceeded the sum of $613,000.00, which represents a net profit of some $291,456.42, or approximately 47.5% on the capital expended on the contract; but complainants show that it is necessary to determine by testimony and the discovery prayed for herein the exact cost thereof. Complainant shows that the defendants and the Orleans and Standard Dredging Companies had for a long period of time been engaged in the

business of dredging and related businesses of hydraulic fill; that they were expert in that field; that the members of the Levee Board were unfamiliar with such matters, and that the members of the Levee Board in authorizing the said contract were grossly and excessively duped and taken advantage of by the overreaching of the Orleans and Standard Dredging Companies, and the defendants herein, and the fraudulent conspiracy and bribery of the President of the Levee Board as set out hereinabove.

The Demands of Complainant.

XIII. Complainant shows, on the facts and things above stated, that the purported contract between the Orleans Levee Board and the Orleans Dredging Company, Inc. was illegal, null, void and of no effect; that pursuant to said null and void contract the total sum of $904,456.42 was paid out of the public funds of the State of Louisiana and of the Orleans Levee Board, an agency thereof, to, or for the account of the corporate defendants herein, through their wholly-owned subsidiary, the Orleans Dredging Company, Inc.; that said payments were made without warrant of law, under mistakes of law, as a result of fraud, illegality, and otherwise as herein alleged, and were ultra vires and beyond the power of the said Levee Board, all to the full and complete knowledge of the Orleans and Standard Dredging companies, upon the fraudulent connivance of the individual defendants herein, and to the grievous loss, injury and damage of the State of Louisiana, and the public fisc thereof, which complainant is entitled to recover and recoup from the defendants herein, as follows:

1. On Account of the Nullity of the Contract

XIV. Complainant is entitled to a judicial declaration of the nullity of the contract above set out, and to have the same rescinded and set aside as illegal, null, void and of no force and effect and to demand

(a) *The Restitution of the Full Contract Price ($904,456.42).*

The complainant is entitled to the restitution of the full and total sum of $904,456.42, as a payment of that which was not due either legally or morally, with interest at the legal rate of five per centum (5%) per annum on the amount, and from the date, of each installment thereof, as money wilfully and knowingly illegally had and received by the Orleans and Standard Dredging Companies, whose debts and liabilities were assumed by the Dredging Realization and Standard Dredging Corporations, defendants herein; and for which the other conspiring individual co-defendants, Cummins, Birch and Shushan, are liable individually and *in solido* and with the said corporate defendants, under the facts of this case, for the return of the entire amount of money disbursed by the Levee Board under said purported contract.

(b) *In the Alternative, Defendants Are Entitled to Retain Only Actual Expenses ($291,456.42.)*

Complainant shows in the alternative, and solely upon the condition that this Honorable Court should decide that complainant is not entitled to the relief above, that under the facts and circumstances set out above, the defendant corporations are not entitled to retain for the account of the Orleans and Standard Dredging Companies more than the actual, necessary expenses properly and reasonably incurred in the performance of the work as a volunteer or *negotiorum gestor*; that those expenses should not have exceeded the sum of Six Hundred Thirteen Thousand ($613,000.00) Dollars at the most, and that the corporate defendants herein, Dredging Realization and Standard Dredging Corporations, are therefore obliged to restore to complainant the sum of not less than Two Hundred Ninety-One Thousand Four Hundred Fifty-Six Dollars and forty-two cents ($291,456.42) with interest thereon at the legal rate of five per centum (5%) per annum from the date of the

completion of the contract. Complainant further shows that the individual defendants herein, Cummins, Birch and Shushan, are liable individually and *in solido* with the said corporate defendants, under the facts of this case, for the amount as set forth above.

2. In the Further Alternative, Defendants Must Disgorge Unconsciensiable Profits

($230,156.42)

XV. Complainant shows in the further alternative, and solely upon the condition that this Honorable Court should decide that complainant is not entitled to the relief above, that the ordinary, usual, reasonable and fair profit on construction contracts generally and on contracts for hydraulic fill is ten per centum (10%) of the cost thereof; that the profit on the work herein was in excess of 47.5%; that under the law of Louisiana and of the United States the duty and obligation was imposed upon defendants and upon the Orleans and Standard Dredging Companies in entering into contractual relationships with agencies of the State of Louisiana to stipulate only for a fair, reasonable and equitable profit upon the work to be done, and not for an unfair, unreasonable and oppressive advantage; that any excessive profits so received, particularly under the facts and circumstances surrounding this case, amounts to an unjust enrichment to the extent of the excess profits which the recipient is under an obligation to repay. Complainant shows that the Orleans and Standard Dredging Companies were thus unjustly enriched at least to the extent of $230,156.42 which the defendants Dredging Realization and Standard Dredging Corporations are bound to restore, and for which the defendants Cummins, Burke and Shushan are liable individually and in solido with the said corporate defendants, under the facts of this case, with interest at the legal rate as above from the date of the completion of the contract.

3. On Account of the Bribe ($130,500.00 and $49,000.00)

XVI. Complainant shows that, over and above and in addition to any other or further liability defendant Abraham L. Shushan has or may have to complainant herein, the said Shushan is bound to restore to the State of Louisiana, as his principal, the total amount of the bribe received by him ($130,500.00) with interest at the legal rate as above on the amount, and from the date of receipt of, each installment thereof, as secret profits unlawfully retained by an agent. Complainant further shows that some time after the receipt of certain Levee Board Bonds as an installment on said bribe, Shushan returned such bonds in the amount of $49,000.00 to the Standard Dredging Co., by whom they were received with the knowledge of defendants Cummins and Birch, in an attempt to confuse and deceive certain United States income tax investigators. Complainants show that these bonds, in the hands of defendants and under the circumstances of this case, were impressed with a trust in favor of complainant herein, and upon their conversion by defendants Birch and Cummins and the corporations herein said defendants became liable as above to complainants therefor over and above and in addition to any other liability they may have to complainant herein.

And, so far as the defendants other than Shushan are concerned, in the further alternative, and solely upon the condition that this Honorable Court should decide that complainant is not entitled to the relief above, then complainant shows that said defendants did conspire to defraud complainant and the Levee Board by paying Shushan, then President thereof, a bribe, and did unlawfully, illegally and knowingly and to the detriment of said complainant and Levee Board divert the sum of $130,500.00 to which complainant and the Levee Board was rightfully entitled to said Shushan, to the detriment and injury of complainant, and for which said defendants are liable, as above, to complainant.

The Need for an Accounting and Discovery.

XVII. Complainant shows that an accounting and discovery of the books and records of defendant corporations, and of the Standard and Orleans Dredging Companies, are necessary to determine and ascertain with precision the amount of the recovery sought under Paragraphs XV (b) and XVI.

Inadequacy of the Remedy at Law.

XVIII. Complainant further shows that it has no adequate remedy at law; that the causes of action herein set forth are properly cognizable in a Court of equity; that a multiplicity of suits are and will be avoided and that the relief herein sought cannot be obtained except in a Court of equity by the exercise of its power to declare the nullity of contracts, and set the same aside, and pronounce them void, and direct the return of that which has been unduly received; that the aid of the Court of equity is necessary for the discovery and accounting and for the other equitable relief herein prayed for.

Prayer for Relief.

Wherefor: the complainant prays for judgment and equitable relief as follows:

1. That this Court decree the contract described above and entered into on the sixth day of March, 1931, between the Orleans Levee Board and the Orleans Dredging Company, Inc., illegal, null, void, and of no effect and rescind, annul, and set aside the same.

2. That the complainant have a decree against the defendants, Claude Cummins, Clarence R. Birch, Dredging Realization Corporation, Standard Dredging Corporation and Abraham L. Shushan, individually and in solido, for the full sum of $904,456.42, with interest at the legal rate of five per centum (5%) per annum on the amount, and from the date, of each installment making up said sum.

3. That in the alternative and solely upon the condition that this Honorable Court should decide that the complainant is not entitled to the relief above prayed for, that the complainant have a decree against the defendants as above mentioned for the total amount of the profits received by the Orleans Dredging Company, Inc., above the actual cost of construction.

4. In the further alternative and solely upon the condition that this Honorable Court should decide that the complainant is not entitled to the relief above prayed for, that the Court determine a reasonable and proper profit to be allowed the Orleans Dredging Company Inc. for the account of the corporate defendants, Dredging Realization Corporation and Standard Dredging Corporation, and that said corporate defendants be required and directed to account to the complainant for all monies of the State of Louisiana received by it on account of profits and to pay to the complainants the excess received of and above such fair and reasonable profits and that the individual defendants, Claude Cummins, Clarence R. Birch, and Abraham L. Shushan be held solidarily liable with said corporations therefor.

5. That complainant have a decree against Abraham L. Shushan for the full sum of $130,500.00, the amount of the bribe herein, with interest on the amount of the various installments from the date of the payment thereof at the legal rate of five per centum (5%) per annum.

6. That complainant have a decree against defendants Claude Cummins, Clarence R. Birch, Dredging Realization Corporation and Standard Dredging Corporation in the full sum of $49,000.00, the value of the bribe bonds returned by Shushan and converted by defendants with legal interest as above from the date of conversion thereof.

7. That in the further alternative, and solely upon the

condition that this Honorable Court should decide that complainant is not entitled to the relief above prayed for, complainant have a decree against the defendants as above, other than defendant Abraham L. Shushan, for the full sum of $130,500.00, being the amount of the bribe paid Shushan as aforesaid, with interest at the legal rate as aforesaid on the amounts of the various installments from the date of the payment thereof.

8. That this Court take and state an account between the complainant and Orleans Dredging Co. Inc., Standard Dredging Co. and the corporate defendants, Dredging Realization Corporation and Standard Dredging Corporation, herein, for the purpose of determining the precise amount claimed herein; and that the complainants have judgment and decrees for the payment by each and all of the defendents of all monies improperly or wrongfully received by each and all of them, or for which each or all of them may be individually and solidarily liable, respectively, upon the accounting, with the responsibility for the transactions set forth in the bill, should this Honorable Court decline to grant the prayer of Paragraph 2 hereof.

9. That the complainant may have such other or further judgment, decrees, or relief as he may be entitled to in the premises and as may be agreeable to equity and to the practice of this Court.

EUGENE STANLEY,
Attorney General,
State of Louisiana;
JAMES J. MORRISON,
Special Assistant Attorney General;
JAMES J. MORRISON,
Executive Counsel.
Louisiana Crime Commission;
N. HALL MCCORD,
Of Counsel.

"PLAINTIFF'S EXHIBIT No. 1."

UNITED STATES OF AMERICA.

SECURITIES AND EXCHANGE COMMISSION.

I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that attached is a full, true and complete copy of:

Pages 1, 2, 8, and 26, as contained in the application for registration of securities filed with this Commission August 19, 1937 by Standard Dredging Corporation, pursuant to the provisions of the Securities Exchange Act of 1934 as amended, under File No. 1-2973.

In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 29th day of May, A. D., 1941, at Washington, D. C.

FRANCIS P. BRASSOR,
Secretary. (Seal).

ORGANIZATION AND GENERAL.

1. Furnish the following information as to the registrant:

(a) Exact name.
Standard Dredging Corporation

(b) Address of principal executive offices.
80 Broad Street, New York, N. Y.

(c) Form of organization.
Corporation.

(d) State or other sovereign power under the laws of which organized.

New Jersey.

(e) Date of organization.

December 21, 1905 as Standard American Dredging Company, and by amendment dated October 17, 1921 the name was changed to Standard Dredging Company, and upon the filing of the Agreement of Merger and Consolidation dated May 5, 1937 in the office of the Secretary of State of New Jersey on September 1, 1937 the name will be changed to Standard Dredging Corporation.

(f) Date of termination of charter or instruments of organization.

Perpetual.

(g) Date upon which the fiscal year ends.

December 31st.

(h) Date and place of annual meetings.

Fourth Monday in March in Jersey City, New Jersey.

2. Give the date of each application pursuant to which registration of any of the registrant's securities on any exchange or exchanges has become effective, and as to each class of securities registered pursuant to such application give the title of issue and name the exchange or exchanges upon which so registered.

Standard Dredging Company made application on or about March 29, 1935 under the Securities Exchange Act of 1934 for the registration of its Convertible Cumulative $2 Preference Stock, no par, and Common Stock, no par, on the Chicago Stock Exchange.

3. As to any securities covered by this application for which separate application is to be made for registration on another exchange, give the title of issue and name the exchange or exchanges upon which to be registered.

Not applicable.

PLAN OF SUCCESSION AND ISSUANCE OF SECURITIES THEREUNDER.

Plan.

4. Describe briefly the general effect of the plan.

The general effect of the agreement of merger and consolidation dated May 5, 1937 is as follows:

(1) The registrant as of September 1, 1937:

a. will retain the plant and equipment of Standard Dredging Company, a New Jersey corporation;

b. will acquire the plant and equipment of National Dredging Company, a New Jersey corporation, and its holdings of stock in Tampa-Clearwater Bridge Company;

c. will become the owner of all the capital stock of Dredging Realization Corporation, a New Jersey corporation, which Corporation will be the owner of certain real estate, mortgages, stock and accounts receivable held by Standard Dredging Company, a New Jersey corporation. The holders of the Twenty Year Liquidating Non-Interest Bearing Notes of Dredging Realization Corporation will be entitled to one vote for each $15 face amount of such notes.

(2) The registrant will be obligated for the liabilities of Standard Dredging Company, a New Jersey corporation, and will assume the liabilities of National Dredging Company, a New Jersey corporation, including the $1,000,000 face amount of Marine Preferred Mortgage 4% Note issued by National Dredging Company, a New Jersey corporation.

(3) The stockholders of Standard Dredging Company, a New Jersey corporation, and National Dredging Company, a New Jersey corporation, will be entitled to receive the securities set forth in answer to subdivision (a) of item 5.

Claude Cummins
President and Director of registrant.
Standard Dredging Company, Director and President
Standard Equipment Company, Director and President
United Dredging Company, Director and President
Orleans Dredging Company, Director and President

Charles B. Clarke
Vice-President and Director of registrant.
Standard Dredging Company, Director and Vice-President
United Dredging Company, Director and Vice-President

Walfred L. Paulson
Vice-President, Secretary and Director of registrant.
Standard Dredging Company, Director, Vice-President and Secretary
United Dredging Company, Director, Vice-President and Secretary
Orleans Dredging Company, Director, Vice-President and Secretary
Standard Equipment Company, Director and Secretary

Clarence R. Birch
Treasurer and Director of registrant
Standard Dredging Company, Director and Treasurer
Standard Equipment Company, Director and Treasurer
United Dredging Company, Director and Treasurer
Orleans Dredging Company, Assistant Secretary

W. A. Campbell
Vice-President and Director of registrant
North American Dredging Company of Texas, Director and President
Standard Dredging Company, Director and Vice-President

Leland E. Yeager
Director of registrant.
Standard Dredging Company, Director
Standard Equipment Company, Director

Donald D. Geary
Member of the firm of Kirlin, Campbell, Hickox, Keating and McGrann, attorneys for Standard Dredging Company for more than five years last past.
Director of registrant.
Standard Dredging Company, Director

Charles F. Guthridge
Vice-President of registrant.
Standard Dredging Company, Vice-President.
United Dredging Company, Vice-President

George G. Daneri
Assistant Secretary and Assistant Treasurer of registrant.
Standard Dredging Company, Assistant Secretary and Assistant Treasurer
United Dredging Company, Assistant Secretary and Assistant Treasurer

The registrant is a corporation and therefore Items 30, 31 and 32 are omitted.

This application comprises:

(a) The application proper, containing pages numbered 1 to 26 consecutively, and insert pages numbered F-1 to F-57, inclusive.

(b) The following exhibits:

Exhibit A. Copy of the Agreement of Merger and Consolidation dated May 5, 1937.

Exhibit B. Copy of the Certificate of Incorporation and amendments thereto of Standard Dredging Company, a New Jersey corporation, and copy of the By-Laws of Standard Dredging Company, a New Jersey corporation.

Exhibit C. Copy of Marine Preferred Mortgage dated January 1, 1937.

Exhibit D. The rights of the holders of the Convertible Preferred Stock and Common Stock referred to in the answer to Item 25 are set forth in Article III of the Agreement of Merger and Consolidation, a copy of which is filed herewith as Exhibit A.

Exhibit E. Specimen of Convertible Preferred Stock and Common Stock of registrant not available at this time.

Exhibit F. Not applicable.

Exhibit G. Copies of agreements between United Dredging Company, a Delaware corporation, and Standard Dredging Company, a New Jersey corporation, and Scott M.

Handley, dated August 1, 1936 and May 7, 1937, respectively.

Exhibit H. Not applicable.

This application is filed subject to the instructions contained in the instruction book for this form as approved under date of February 24, 1937, and as amended to and including April 7, 1937.

Upon the basis of the statements and documents comprising this application the undersigned hereby applies for registration pursuant to Section 12 (b) and (c) of the Securities Exchange Act of 1934 of the securities specified on the facing sheet of this application on the respective exchanges there specified.

August 6th, 1937.

STANDARD DREDGING COMPANY,
By CLAUDE CUMMINS,
President.

[SEAL.]

Attest:

C. R. BIRCH,
Asst. Secy.

"PLAINTIFF'S EXHIBIT No. 2."

Excerpt From the Minutes of the Meeting of the Board of Levee Commissioners of the Orleans Levee District Held February 21, 1931.

President Shushan submitted, for the information of the Board, a proposed supplemental contract to be made with the Orleans Dredging Company, for the fill on the Airport, at their previous bid of 13.9 cents per cubic yard of fill. He stated the same was a renewal of that company's previous price submitted in competitive bidding after thirty days advertising, but which work was held up on account of the Court injunction by the camp owners in Zone 5 of the Lake Front area; that following the usual procedure in matters of this kind, a contract was signed between the Orleans Dredging Company and the Board and bond to cover was furnished by the Orleans Dredging Company; that Court proceedings in the form of an injunction by the camp owners, as taxpayers, was taken out and prevented this work going forward, and in a spirit of cooperation with this Board the Orleans Dredging Company agreed, after some persuasion, to suspend their contract and filed no claim of any kind against this Board in connection with the same, and now that it is possible to proceed with this work the Dredging Company has asked a renewal of that contract under the terms and conditions and at the same price prevailing at the time of their bid. He stated Chief Engineer Klorer has informed him that, taking into consideration all of the elements of this work and the fact that the contractor will be required to dredge his material a considerable distance out into the Lake, this is a very favorable price, and General Counsel Wilkinson has rendered a written opinion in which he advises that the Board has the legal right to renew the contract under these conditions, and in consideration of the friendly spirit of cooperation shown by the contractors towards this Board, at a time when the Board found itself unable to proceed, it is only fair that the contract be renewed.

Chief Engineer Klorer confirmed the statement made by President Shushan and stated since his last conversation with Mr. Shushan on the subject a certain contractor had

approached him in the interest of having this work readvertised, stating that he was in position to submit a much lower bid at a considerable saving to the Board, but the proposition was not put in writing by the contractor but was given to him orally and he has no assurance of this being done. Mr. Klorer reaffirmed the statement of President Shushan, as to the price being a favorable one under the conditions required for this fill and because of the nature of the material to be secured and the distance from which it would have to be pumped.

Mr. Waguespack stated that he did not think it would be fair, under any circumstances, for this Board to peddle the price of any contractor, especially when a price is given in competitive bidding under sealed bids after advertisements being run for 30 days inviting bids, particularly in this case where such splendid cooperation was given the Board at a time when it was possible for the low bidder to make large claims against the Board. He stated anybody can underbid a known price, and he therefore did not think the Board should entertain any other contractor but should renew the previous contract with the Orleans Dredging Company.

Mr. Thomas stated there was a doubt in his mind as to whether or not the job should be readvertised or the previous contract renewed and, while the price in the previous contract was a favorable one, he thought it might be possible, if the work was readvertised, to receive a better price.

Commissioners Whiteman and Malone stated they were in agreement with the position of Mr. Shushan, as they felt the price was a favorable one, and in justice to the firm submitting the same in open competition they did not think it fair to peddle the price, and, unless the Board could be given definite assurances of a material saving in the cost, they would be opposed to readvertising and would favor a renewal of the previous contract, especially since the Chief Engineer and the General Counsel are in agreement that the Board's interests can be best served that way.

Mr. Waguespack stated that he was fully in accord with the expressions of Messrs. Shushan, Whiteman and Malone, and concurred in their opinions about this matter, and he would therefore move that the President, or, in his absence or incapacity to act, the President Pro-Tem, be and he is hereby authorized and empowered to enter into a renewal

of the previous contract with the Orleans Dredging Company at the price of 13.9 cents per cubic yard, along the lines of the supplemental agreement exhibited to the Board, as drawn by the Chief Engineer and approved by the General Counsel. Mr. Whiteman seconded the motion and the same carried unanimously.

"PLAINTIFF'S EXHIBIT No. 3."

Contract Between Board of Levee Commissioners of the Orleans Levee District and Orleans Dredging Company, Inc., Dated March 6, 1931.

UNITED STATES OF AMERICA, STATE OF LOUISIANA, PARISH OF ORLEANS, CITY OF NEW ORLEANS.

No. —.

CONTRACT BOARD OF LEVEE COMMISSIONERS OF THE ORLEANS LEVEE DISTRICT With ORLEANS DREDGING CO., INC.

BE IT KNOWN, that on this 6th day of the month of March, in the year of our Lord one thousand nine hundred and thirty-one of the Independence of the United States of America, the one hundred and fifty-fifth BEFORE ME N. H. POLMER a notary public, duly commissioned and qualified, in and for the City and Parish of Orleans, therein residing, and in the presence of the witnesses hereinafter named and undersigned.

PERSONALLY CAME AND APPEARED:

1st: A. L. SHUSHAN, ESQ., President of and herein representing and acting for the Board of Levee Commissioners of the Orleans Levee District, an Agency of the State of Louisiana, by virtue of a resolution of said Board adopted at a meeting convened on the 21st day of February, 1931, a duly certified copy of which resolution is hereto attached and made part hereof; said Board of Levee Commissioners being hereinafter called "The Board", or "the said Board."

2nd: ORLEANS DREDGING COMPANY, INC. hereinafter called the "Contractor", or "the said Contractor," or W. L. DUEASE, Secretary-Treasurer of and herein representing the Orleans Dredging Co., Inc., hereinafter called "the Contractor"; the said W. L. DUEASE being hereto duly authorized by virtue of a resolution of the Board of Directors of said Orleans Dredging Co., Inc., adopted at a meeting held on the 5th day of March, 1931, a duly certified copy of said resolution being hereto attached.

WHO DECLARED:

Whereas the Board of Commissioners of the Orleans Levee District did on March 6, 1929 advertise for bids for the construction of a Bulkhead and a hydraulic fill on the south shore of Lake Pontchartrain east of the Industrial Canal for the purpose of creating a site to be used as an Air-port, and

Whereas, two (2) bids were received for this work on April 8th, 1929, the date specified for the opening of bids, of which two bids, that of the Orleans Dredging Co., Inc., was the lowest and most acceptable to the Orleans Levee Board; and

Whereas as a result of the opposition of certain camp-owners on the Lake Front in the vicinity of the proposed work who were unwilling to vacate or remove their camps, the Board of Commissioners of the Orleans Levee District was enjoined from accepting this bid and entering into contract with the Orleans Dredging Co., Inc., on the grounds that the Constitutional Amendment authorizing the work comprising the Lake Front Development including the construction of an Air-port, did not permit any work of the character proposed being undertaken in Zone 5, lying east of the Industrial Canal, until after certain other work was completed in Zones 1, 2 and 3—which other work was not at that time completed; and

Whereas; the contention of the camp-owners was upheld in the State Supreme Court, and it was necessary thereafter to pass remedial legislation in the shape of a Constitutional Amendment that had to be submitted to the voters of the State of Louisiana for approval at a general state-wide

election, in order to give the Board of Commissioners of the Orleans Levee District the necessary authority to construct this proposed Airport in Zone 5 of the Lake Front Development; and

Whereas; said Constitutional Amendment was approved in the general State Election held on November 4th, 1930, and the Board of Commissioners of the Orleans Levee District is now free to proceed with work originally contemplated in Zone 5, east of the Industrial Canal, provided such work is limited to the airport construction; and

Whereas, during the interval between the original date of opening the bids and the present time, additional study given to the subject of the Airport indicates the advisability of increasing the dimensions of the Airport and also, for engineering reasons, the advisability of substituting a concrete sheet-pile bulkhead for the steel sheet-pile bulkhead originally specified, and

Whereas, the Board of Commissioners of the Orleans Levee District has entered into a contract with the Fuller Construction Co., Inc., for the construction of a concrete sheet-pile Bulkhead, upon which contract, work will shortly begin; and

Whereas, the Orleans Dredging Co., Inc., the low bidder on the combined work of steel sheet-pile bulkhead and hydraulic fill, is agreeable to entering into a contract with the Board of Commissioners of the Orleans Levee District for placing the hydraulic fill at the price quoted at the public letting previously referred to, namely, thirteen and nine-tenths (13.9) cents per cubic yard in place, and the Orleans Dredging Co., Inc., if awarded this item of work, will make no claims for being deprived of all the other items of work mentioned in the said proposal; and

Whereas, the Board of Commissioners of the Orleans Levee District is of the opinion that the price quoted for the hydraulic fill is a fair and reasonable bid to the Orleans Levee District.

Therefore, it is mutually agreed to and assented to by the Orleans Dredging Co., Inc., and the Board of Commissioners of the Orleans Levee District to permit the modification of the proposal submitted by the Orleans Dredging

Company, Inc., on April 9th, 1929 in such manner as to exclude from that proposal, all items of work referring to work other than the placing of the hydraulic fill within the bulkhead (see Item 6) and to specifically exclude from the specifications all paragraphs and provisions that apply to such excluded items of work, that is items 1, 2, 3, 4, 5, 7 and the said proposal of the Orleans Dredging Co., Inc., so modified, is accepted by the Board of Commissioners of the Orleans Levee District;

It is further understood and agreed that the Board of Commissioners of the Orleans Levee District shall provide a concrete sheet-pile bulkhead of such design and construction that it will retain the fill to be placed by the Orleans Dredging Co., Inc.,

Provided that the required date for beginning the work will be within thirty days after notification is given to the Orleans Dredging Co., Inc., by the Chief Engineer of the Orleans Levee District, in lieu of "within thirty days after the signing of the contract," as stated in the proposal; And, provided further, that the time required to complete the fill will be seven months from and including the thirtieth day after the date of notification to begin work, in lieu of *six* months "from and including the thirtieth day after the signing of the contract," and also in lieu of the specified rate of 600,000 cubic yards per month as stated in the proposal. And provided further that due to the increased dimensions of the proposed airport, *the estimated quantity of the fill has correspondingly been increased to 4,000,000* cubic yards from the 3,000,000 cubic yards estimated as stated in *paragraph 13 of the Special Specifications* and that the time for completion will apply not only to the 4,000,000 cubic yards presently specified as the quantity in the proposal, but *shall also include the 50% additional quantity permitted under the provisions of the specifications.*

And provided further; that for any delayed completion beyond this time of completion, the contractor shall be charged $200.00 per calendar day demurrage as acknowledged and liquidated damages and on the other hand shall be allowed a bonus of $200.00 per calendar day for every

day that the dredging operations shall have been completed in advance of the specified time for completion.

And provided: that in lieu of obtaining the material for the fill from the lake bottom "at a distance of not less than 2000 feet from the front lake side of the bulkhead" it shall be taken from two pit areas shown on Drawing L. D. 1707 dated February 4th, 1931 hereto attached and forming a part of the proposal, and paraphed "Ne Varietur" by me, Notary for identification. The material obtained from Pit A (approximately two million cubic yards) is to be used in constructing the fill to the approximate elevation of Lake level over the entire area of the airport site, and the material obtained from Pit B, more sandy in character, is to be superimposed and utilized in bringing the fill to final grade as shown on blue print L. D. 1707.

It is further provided that upon completion of the fill, if same should be above the prescribed grade, contractor shall not be required to remove the excess fill and it shall make no claim for payment for said excess.

It is further provided that the Board of Commissioners of the Orleans Levee District has full authority to increase the quantity provided in the original proposal, to such quantity as may be necessary to complete the project according to plan L. D. 1707 dated February 4, 1931, or to increase the elevations as shown on said plan.

It is further provided that the said Board of Commissioners shall make payments to the said contractor, monthly, for all filling placed in accordance with this contract. A retainer of ten per cent (10%) will be reserved from each monthly payment until the total of said retainers amounts to the sum of Fifty Thousand Dollars ($50,000.00) after which time all monthly payments shall be made in full to said contractor. Final payment, including above mentioned retainer of $50,000.00, less any amount which may be due by said Contractor to said Board hereunder, will be made to said Contractor 90 days after completion and acceptance of this contract. Said monthly estimates are to be made without prejudice to the right of either party to this contract.

All the requirements, terms, conditions, obligations and benefits and all the stipulations of the original contract are reiterated herein and made a part hereof as though copied herein in extenso if not inconsistent herewith.

BOND

And now to these presents, personally came and intervened UNION INDEMNITY COMPANY, herein represented by Joseph Meyers, Attorney in Fact WHO DECLARED:

That he has read and taken cognizance of the above and foregoing contract between the Board of Levee Commissioners of the Orleans Levee District and Orleans Dredging Company, Inc., Contractor, and binds said Company in solido with the said Contractor unto the Board of Levee Commissioners of the Orleans Levee District in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) as security for the faithful and satisfactory performance by the said Orleans Dredging Company, Inc., of all the clauses and conditions of this contract and the payment by said Contractor and by all sub-contractors for all work done, labor performed and material furnished under this contract, in accordance with the law, the condition of this obligation being that if the said Orleans Dredging Co., Inc., Contractor shall well, truly and faithfully and satisfactorily perform all of the obligations assumed by itself under this contract and payment be made by said Contractor and by all sub-contractors for all work done, labor performed, and material furnished under this contract in accordance with law, then this bond shall become null and void, otherwise, to remain in full force and effect.

The said surety consents and yields to the jurisdiction of the Civil District Court for the Parish of Orleans, State of Louisiana and formally waives any plea of jurisdiction on account of residence elsewhere in the event of suit under the contract and bond and the surety herein shall be limited to such defense only as the principal of this bond could make.

THUS DONE AND PASSED, in my office at the City of New Orleans on the day, month and year herein first above written, in the presence of Charles J. Donner and Richard Leche competent witnesses who hereunto sign their names with

the said appearers and me, Notary, after reading of the whole.

BOARD OF LEVEE COMMISSIONERS
ORLEANS LEVEE DISTRICT,
(Signed) By A. L. SHUSHAN,
Pres.
ORLEANS DREDGING CO., INC.,
(Signed) By W. L. DUEASE,
Sec'y.-Treas.
UNION INDEMNITY COMPANY,
(Signed) By JOS. C. MAYERS,
Attorney-in-Fact.

Witnesses:
(Signed) RICHARD W. LECHE,
CHAS. J. DONNER.

Approved:
(Signed) By JOHN KLORER,
Chief Engineer.

Approved:
(Signed) JAMES WILKINSON,
General Counsel.

(Signed) N. H. POLMER,
[NOTARIAL SEAL.] *Notary Public.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ....., ORIGINAL.

STATE OF LOUISIANA,
Plaintiff,

against

CLAUDE CUMMINS, CLARENCE R. BIRCH, DREDGING REALIZATION CORPORATION, STANDARD DREDGING CORPORATION and ABRAHAM L. SHUSHAN,
Defendants.

OPPOSITION TO THE MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE COMPLAINT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now Claude Cummins, Clarence R. Birch, Dredging Realization Corporation, a corporation of New Jersey, and Standard Dredging Corporation, a corporation of New Jersey, sought to be made defendants in the above entitled cause, and in response to the rule to show cause issued herein on June 9, 1941, oppose the motion of the State of Louisiana for leave to file its complaint in this Court on the following grounds:

1. The Court would be without original jurisdiction because the cause of action, if any, asserted in the proposed complaint is vested in the Board of Levee Commissioners

of the Orleans Levee District, which is a political corporation and a legal entity entirely distinct from the state.

2. The Court would be without jurisdiction because the matters set forth in the proposed complaint involve a controversy with defendant Shushan who is a citizen of the State of Louisiana. There is therefore no diversity of citizenship to support federal jurisdiction, and, since Shushan's rights are involved, the difficulty cannot be cured by dismissing as to him and proceeding in his absence.

3. The Court should in any event decline to take jurisdiction of the proposed case because it is brought by a state against citizens of other states simply for a money judgment, and there is no showing of the want of another forum.

WHEREFORE, with full reservation of all motions, pleas and defenses to the proposed complaint, the defendants respectfully pray that this Court deny the motion of the State of Louisiana for leave to file its proposed complaint herein.

September 29, 1941.

ROGER SIDDALL,
120 Broadway, New York, N. Y.

and

EBERHARD P. DEUTSCH,
Hibernia Bank Bldg., New Orleans, La.
Attorneys and counsel for defendants Cummins, Birch, Dredging Realization Corporation and Standard Dredging Corporation.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ....., ORIGINAL.

STATE OF LOUISIANA,
Plaintiff,
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CLAUDE CUMMINS, CLARENCE R. BIRCH, DREDGING REALIZATION CORPORATION, STANDARD DREDGING CORPORATION and ABRAHAM L. SHUSHAN,
Defendants.

BRIEF IN OPPOSITION TO THE MOTION OF THE STATE OF LOUISIANA FOR LEAVE TO FILE COMPLAINT.

Statement.

The State of Louisiana has annexed to its motion papers its proposed complaint. In this it is alleged that on March 6, 1931, a contract for filling marsh land to make an airport was entered into between the Board of Levee Commissioners of the Orleans Levee District (hereinafter called the Levee Board) acting through its president, Abraham L. Shushan, and the Orleans Dredging Company, Inc., and that this contract was performed by the dredging company's making a fill of approximately 6,479,780 cubic yards of earth, for which it was paid at the stipulated price

of 13.9 cents per cubic yard. It is further alleged that for the purpose of inducing his favorable action on said contract defendant Shushan was bribed in an amount upwards of $130,000 by representatives of the dredging company. Because of this the complaint seeks to recover back all or some part of the compensation paid to the dredging company under the contract, as well as the alleged bribe.

The defendants against whom redress is sought are, besides Shushan, Standard Dredging Corporation, which is alleged to have been the parent company of Orleans Dredging Company, Inc., Dredging Realization Corporation, which is alleged to have taken over the assets of Orleans Dredging Company, Inc., when the latter was dissolved some time ago, and two individuals, Cummins and Birch, who are alleged to have been officers of Orleans Dredging Company, Inc., and its parent at the time of the matters complained of.

The two corporate defendants are alleged to be New Jersey corporations with their principal places of business located in the City of New York. Cummins is alleged to be a citizen of California resident in the City of New York, and Birch is alleged to be a citizen of New York resident in New York. Defendant Shushan is alleged to be a resident and citizen of Louisiana. There is, therefore, a lack of diversity of citizenship between plaintiff and defendant Shushan.

POINT ONE.

THE CAUSE OF ACTION, IF ANY, ALLEGED IN THE PROPOSED COMPLAINT IS VESTED IN THE LEVEE BOARD, AND NOT THE STATE OF LOUISIANA, AND THE CASE, THEREFORE, IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT.

The contract for the airport fill which forms the subject matter of the proposed complaint was entered into on March 6, 1931, between The Board of Levee Commissioners of the Orleans Levee District (hereinafter called the Levee Board), party of the one part, and Orleans Dredging Company, Inc., party of the other part. This Levee Board, as the proposed complaint alleges in Article IV, was created pursuant to Louisiana Act 93 of 1890. Section 3 of that act, which remains unrepealed and unamended to date, reads as follows:

> "That said commissioners shall constitute and be styled 'The Board of Levee Commissioners of the Orleans Levee District', and as such are hereby constituted and created a body politic, with needful succession and corporate powers; shall have power to sue and be sued in their corporate name; shall have a common seal, and shall have the franchise and power to do and perform all the purposes of this act; and to acquire, hold, own and convey all the property, real and personal, needful in the premises, and to alienate, mortgage and pledge the same for said purposes.
>
> "The domicile of this Board shall be in the City of New Orleans, where it shall be suable; and service of citation shall in all cases be made upon its President."

The particular authorization for the airport construction in question is, as alleged in Article VI of the proposed

complaint, found in an amendment to the Louisiana Constitution adopted November 4, 1930 (Art. 16; Sec. 7b—the proposed complaint says Sec. 76, but this is apparently a misprint for Sec. 7b).

At the same time, the Constitution was amended by adding to Article 16 a Section 7a which provides that:

> "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted."

Thus by constitutional sanction the powers of the Levee Board were put beyond the authority of the legislature to alter or repeal.

In this situation it is the firmly settled law of Louisiana that the Levee Board, though an agency of the state, is a legal entity wholly apart from the state, and that consequently a cause of action arising from board affairs rests with the board, and cannot be sued upon by the state. *State* v. *Tensas Delta Land Co.*, 126 La. 59; 52 So. 216 (1910); *State* v. *Standard Oil Co.*, 164 La. 334; 113 So. 867 (1927). In the former case the court said on page 72 (126 La.):

> "The argument that the said board is nothing more than a mere agency or instrumentality of the state, and that therefore the state may sue in every case where the said board might sue, contains a manifest non sequitur. Every city, town, and parish of the state is a mere agency or instrumentality of the state; but no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the state, any cause of action which any of them might have."

and in the latter case on page 357 (164 La.):

> "The board is a state agency, of course, just as any other subdivision incorporated by an act of the Legislature is a state agency; but the board has the right to sue and be sued, and it alone must assert its rights of action. The Attorney General has no right to sue for and in the name of the state on a cause or right of action possessed only by the levee board."

In *Board* v. *Hardtner,* 164 La. 632; 114 So. 494 (1927) the point was pushed a little further and it was held that a levee board could bring a suit against state officers and set aside a sale of the board's property that these officers had purported to make in behalf of the state, and in *Saint* v. *Allen,* 172 La. 350; 134 So. 246 (1931) it was held that the Louisiana Highway Commission, which, like the levee boards, was a political corporation, was empowered to employ its own legal staff free from control of the Attorney General. In this latter case the court said (172 La. 360):

> "The commission, in our opinion, is a distinct legal entity from the state. Section 3 of Act 95 of 1921 (Ex. Sess.) makes it a body corporate, with power as such to sue and be sued. It is an agency of the state, and not the state itself, created for the purpose of executing certain duties, devolving primarily upon the state. In a general sense, in its relations to the state, it is not dissimilar to levee districts, which are bodies corporate, created for the purpose of constructing and maintaining levees, which are duties devolving primarily upon the state. It was held in *State* v. *Standard Oil Co.,* 164 La. 334, 357, 113 So. 867, and in *State* v. *Tensas Delta Land Co.,* 126 La. 59, 52 So. 216, that a levee district, though the creature and agency of the state, had, as long as it was permitted to exist, a separate existence from the state, and that the state could not sue on causes of action accruing to the district."

Louisiana v. *Jack*, 244 U. S. 397 (1917), arose as a sequel to the *Tensas* case and in its decision this Court recognized and gave full faith to the rule above announced.

There cannot, therefore, be the slightest doubt that the cause of action, if any, set forth in the proposed complaint is vested in the Levee Board and not in the State of Louisiana.

But, the proposed complaint alleges, the state is proceeding through its newly formed State Crime Commission under authority of Louisiana Act 13 of 1940.

Section 3b of Act 13 of 1940 does, as the state's brief points out, authorize representatives of the Crime Commission to bring civil proceedings in the name of the State of Louisiana for recovery of any moneys, etc. that may have been diverted from the state, and it is true, as the state's brief says, that Section 2 of the act defines the word "State" as including all public boards and commissions. What the state's brief fails to point out, however, is that this authority to bring suits is limited to suits at Baton Rouge or at the domicile of the defendants. The second paragraph of Section 3b reads as follows:

> "That any suit filed under the provisions of this Act may be instituted in the Nineteenth Judicial District, Parish of East Baton Rouge, Baton Rouge, Louisiana, or at the domicile of the defendant, or any one of the defendants named in such suit, at the discretion of the Commission, and shall be tried by preference and before any and all other civil proceedings. The Commission is empowered, whenever it believes such course necessary or desirable, to commence any such civil proceedings by attachment of any property of the defendant or defendants, without the necessity of posting bond."

A suit in the Supreme Court of the United States is clearly not authorized by Act 13 of 1940.

Notwithstanding this, we move to broader ground. For purposes of argument we may assume that either through Act 13 of 1940 or some other legislation the State of Louisiana has been authorized to sue on the Levee Board's cause of action.

Having regard to the constitutional amendment above referred to, the effect of this would not and could not be to shear the Levee Board of its powers or to divest it of its cause of action. The state would merely be constituted as collecting or enforcing agent, and the Levee Board would necessarily remain as owner of the cause of action.

In *Louisiana* v. *Jack, supra,* the Louisiana legislature, in an effort to circumvent the holding of the *Tensas* case, passed a statute by which it was "hereby made the duty of the Attorney General of the State, upon the request of the Governor to represent the State or any political agency or subdivision thereof, in any suit in any court involving title to any land or real property belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State or in the name of any of its political agencies or subdivisions". This Court held that notwithstanding this statute, the levee board still owned the cause of action, and could compromise it.

In *People* v. *Wood,* 121 N. Y. 522, 530 (1890), a similar statute of New York was involved, and it was held that the state sued merely as agent or representative of the defrauded political subdivision, and that the case would be determined by the same principles as though the political subdivision had brought it directly.

Even if we assume, therefore, that the State of Louisiana is rightfully here, nevertheless, it can only sue as the rep-

resentative or agent of the Levee Board, and the Supreme Court will have no original jurisdiction.

Were this not so, the original jurisdiction of the Supreme Court could be invoked simply by the expedient of having a state legislature pass a law appointing the state trustee or agent for purpose of bringing suit, and thus the original jurisdiction of the Court would be made to depend on the will of state legislatures. Certainly this was never intended.

In *Oklahoma* v. *Cook,* 304 U. S. 387 (1938), Oklahoma on relation of its Bank Commissioner asked leave to bring a suit in this Court's original jurisdiction to enforce stockholders' liability to an insolvent state bank. In the Oklahoma Banking Law it was provided that the Bank Commissioner was authorized "to prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him" and that such suits were to be brought "in the name of the State of Oklahoma, on the relation of the Bank Commissioner". This Court held that it would have no jurisdiction saying that to bring a case within the original jurisdiction it was not enough that a state was plaintiff or that it had acquired legal title to the cause of action if the beneficial interest was elsewhere.

In *New Hampshire* v. *Louisiana,* 108 U. S. 76 (1882), original jurisdiction was refused of a suit sought to be brought by the State of New Hampshire to collect on bonds of Louisiana which had been assigned to the state pursuant to a statute which provided that citizens of New Hampshire might assign their bonds to the state for purposes of bringing suit. The decision was based on the ground that the state would be acting for others in prosecuting the case.

In *Kansas* v. *U. S.,* 204 U. S. 331 (1907), it was held that Kansas could not invoke the original jurisdiction of

the Supreme Court where the action was brought for the benefit of a railroad.

In *Oklahoma* v. *A. T. & Santa Fe Ry.*, 220 U. S. 277 (1911), the state sought to enjoin the enforcement of certain railroad rates by the defendant. Jurisdiction was denied on the ground that the state had no property interest in the litigation as a corporate body itself, and no standing to represent such of its citizens as might be shippers.

In *Missouri* v. *Illinois*, 180 U. S. 208 (1901), the Supreme Court took original jurisdiction of an action to restrain the commission of a nuisance which would have threatened several large municipalities of the plaintiff state. The Court emphasized, however, that more was at stake than the mere welfare of one or two communities saying (p. 241):

> "The health and comfort of the large communities inhabiting those parts of the State on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves through the territory of the State."

In *Louisiana* v. *Texas*, 176 U. S. 1 (1900), original jurisdiction was refused of a suit to restrain the enforcement of Texas quarantine regulations to the alleged damage of citizens of Louisiana. In a concurring opinion, Brown, J., said on page 28:

> "* * * The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant."

In its brief attached to the motion papers, the plaintiff makes no effort to avoid the rule of the decisions just quoted other than to cite *State* v. *Walmsley*, 181 La. 597; 160 So. 91 (1935), which is a Louisiana case that has no bearing on

the question of the Supreme Court's original jurisdiction, and to reiterate the statement that the fisc of Louisiana has been damaged.

If by saying that the fisc has been damaged the plaintiff means that the State Treasury has been damaged, the statement cannot be accepted, because it is abundantly clear from Article 16, Section 7, of the Louisiana Constitution, pursuant to which the airport was constructed, that the Levee Board's funds were entirely separate from the state's funds. If, however, all that is meant is that the state as *parens patriae* is damaged whenever its citizens or agencies are damaged, then the statement is unexceptionable enough, but it is quite insufficient to show the state's interest as party plaintiff.

The Orleans Levee Board is only one out of some 22 levee boards in the state. It is only one out of countless political corporations in the state. Should the Court entertain this suit, brought by the state for the benefit of its minor agency, the Court would, by the precedent so established, have to entertain suits arising out of the activities of any city, village, levee board or what not that the state should choose to sue for.

POINT TWO.

THE PRESENCE OF SHUSHAN, A CITIZEN OF LOUISIANA, AS DEFENDANT PREVENTS THE COURT FROM HAVING JURISDICTION, BUT, SINCE SHUSHAN'S RIGHTS ARE INVOLVED IN THE CONTROVERSY, THE DIFFICULTY CANNOT BE CURED BY DROPPING HIM AS DEFENDANT AND PROCEEDING IN HIS ABSENCE.

The controversy as alleged in the proposed complaint involves the defendants here appearing, citizens of states other than Louisiana, who are alleged to have paid the

bribe and enjoyed its fruits, the defendant Shushan, a citizen of Louisiana, who is alleged to have received the bribe, and the State of Louisiana as plaintiff, which, we assume for purposes of this argument, is alleged to have been damaged.

The presence of Shushan as defendant prevents a complete diversity of citizenship and the result is that the Supreme Court would not have jurisdiction. This is the rule of an unbroken line of authorities. *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. 553 (1871); *California* v. *Southern Pacific Co.*, 157 U. S. 229 (1895); *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199 (1902); *New Mexico* v. *Lane*, 243 U. S. 52 (1917); *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158 (1922); and others.

The attempt of the state to invoke the doctrine of separable controversy so as to avoid the effect of this rule is ingenious, but it hardly needs answering.

A *defendant* may, if there be a separable controversy involving him in which the diversity of citizenship is complete, remove the case to a federal court notwithstanding that there are other controversies where the diversity is not complete. This is for the obvious reason that a plaintiff should not be able to deprive a defendant of his resort to the federal court by the mere device of joining something else onto the complaint.

But to turn the thing around so that the effect of it would be to allow a *plaintiff* to bring a suit in the federal jurisdiction when there is not diversity of citizenship, by the expedient of merely joining some other separable controversy onto the complaint, would be to open the federal courts to every kind of case that any ingenious pleader wished to bring. One will search *Ohio* v. *Helvering*, 292 U. S. 360 (1934), and indeed all other authority, in vain for support of any such astonishing proposal.

However, on page 5 of its brief the state invites the Court to strike Shushan as defendant, and then entertain the suit.

This is exactly the situation that arose in *California* v. *Southern Pacific Co., supra.* There the state brought a bill in equity against the railroad to clear title and recover possession of certain water front property that the railroad occupied. In the course of the trial it became apparent that the City of Oakland, and the Oakland Water Front Company, both California corporations, were interested in the controversy since it was through a grant from the state to these corporations that the railroad claimed its rights, and the validity of that grant was, therefore, in issue. This Court held that by reason of the finality of its own decisions it was not appropriate that it should exercise its original jurisdiction where the rights of absent parties were involved, even though the absent ones were not indispensable parties to the case and even though they would not be bound by the decision. On page 257 (157 U. S.) the Court says:

> "We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal."

Since the joinder of Oakland and the water front company would have divested the court of jurisdiction under the rule mentioned above, the case was dismissed.

Apparently realizing that *California* v. *Southern Pacific Co.* is an insurmountable obstacle, the state in its brief rests

heavily on the dissenting opinion in that case. This, we suppose, is tantamount to a request that the holding be overruled.

It is true that *California* v. *Southern Pacific Co.* was a hard case, and there is force in what the dissenting judge wrote. But the primary question involved, there as here, was a question of the state's domestic political conduct, and to permit the state, by the device of involving outsiders, to resort to the Supreme Court for the purpose of resolving disputes among its own political subdivisions and their officers, and in their absence too, would surely be as unwise as it would be fraught with trouble.

We respectfully submit that the trial under the exceptional jurisdiction of the Supreme Court of an issue of bribery between a state and its own public servant, and in the absence of the public servant too, would neither "comport with the gravity and finality which should characterize such an adjudication", nor would it comport with the dignity of the Court.

POINT THREE.

THE COURT SHOULD DECLINE JURISDICTION OF THE PROPOSED ACTION UNDER THE RULE OF *Massachusetts* v. *Missouri*, SINCE IT IS BROUGHT BY A STATE AGAINST CITIZENS OF OTHER STATES SIMPLY FOR A MONEY JUDGMENT, AND THERE IS NO SHOWING OF THE WANT OF ANOTHER FORUM.

The complaint which the State of Louisiana proposes to file in this proceeding is characterized by the state as one in equity, on a cause of action for which the plaintiff alleges it has no adequate remedy at law. In truth and in fact, however, the essence of the alleged cause of action is simply a declaration for money had and received, and the ultimate

relief for which the state prays is merely a judgment for money.

The alleged multiplicity of suits to be avoided arises on the suggestion of the state that unless the jurisdiction of the Supreme Court is invoked, it will have to sue the defendant Shushan in Louisiana and the other defendants elsewhere. As it is alleged, however, that all the other defendants are present in New York, only one other suit would be necessary, and certainly two suits are not such a multiplicity as to justify a bill in equity. *Empire Engineering Corp.* v. *Mack*, 217 N. Y. 85 (1916); *Kohlhamer* v. *Smietanka*, 239 Fed. 408 (1917).

In 1886 this Court held in *Buzard* v. *Houston*, 119 U. S. 347, that a bill praying for discovery and for rescission and cancellation of a contract on the ground of fraud, coupled with a money demand and various alternative and additional claims, was nevertheless an action at law triable by jury and not maintainable as a suit in equity, since "a judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled" (p. 353).

More recently in *U. S.* v. *Bitter Root Development Co.*, 200 U. S. 451 (1906), this Court held that neither a demand for an accounting, the necessity of discovery, nor even an alleged multiplicity of suits would support a bill in equity when the relief sought was merely a judgment for money. The equitable remedies prayed for, said this Court, could all be made available incidentally in an action at law; and as to the alleged multiplicity of suits: "Those persons who were guilty of the wrong must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other" (p. 479).

In *Curriden* v. *Middleton*, 232 U. S. 633 (1914), it was held that an action for damages arising out of a conspiracy

to defraud is justiciable at law and not in equity, even though the prayer for relief seeks discovery.

It is clear, therefore, that the proposed action is simply one at law, seeking recovery of money, and that the defendants are entitled to a jury trial even if the case be proceeded with in the Supreme Court. 28 U. S. C. 343.

In this exact situation, i. e., where a state seeks to bring an action at law against citizens of other states, the Court has ruled that it will not take original jurisdiction in the absence of special facts to show the want of another forum. *Massachusetts* v. *Missouri,* 308 U. S. 1 (1939) where it was said (p. 18):

> "In the exercise of our original jurisdiction so as truly to fulfill the constitutional purpose we not only must look to the nature of the interest of the complaining State—the essential quality of the right asserted—but we must also inquire whether recourse to that jurisdiction in an action by a State merely to recover money alleged to be due from citizens of other States is necessary for the State's protection. In *Oklahoma* v. *Cook, supra,* we called attention to the enormous burden which would be imposed upon this Court if by taking title to assets of insolvent state institutions, including claims against citizens of other States, a State could demand access to the original jurisdiction of this Court to enforce such claims. To open this Court to actions by States to recover taxes claimed to be payable by citizens of other States, in the absence of facts showing the necessity for such intervention, would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it. We have observed that the broad statement that a court having jurisdiction must exercise it (see

Cohens v. *Virginia,* 6 Wheat. 264, 404) is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum. *Canada Malting Co.* v. *Paterson Co.,* 285 U. S. 413, 422; *Rogers* v. *Guaranty Trust Co.,* 288 U. S. 123, 130, 131. Grounds for justifying such a qualification have been found in 'considerations of convenience, efficiency and justice' applicable to particular classes of cases. *Rogers* v. *Guaranty Trust Co., supra.* Reasons not less cogent point to the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States."

In the instant case there is no showing whatever of lack of an adequate forum. On the contrary, the State of Louisiana can certainly pursue Shushan in its own courts, and as to the other defendants it can come to New York. *Delafield* v. *Illinois,* 2 Hill. 159, and 26 Wend. 192 (1841). There is not the slightest need to invoke the exceptional jurisdiction of the Supreme Court of the United States.

September 29, 1941

Respectfully submitted,

Roger Siddall,
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and

Eberhard P. Deutsch,
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Attorneys and counsel for defendants Cummins, Birch, Dredging Realization Corporation and Standard Dredging Corporation.

IN THE

Supreme Court of the United States

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

& CLAUDE CUMMINS, ET AL., *Defendants*.

OPPOSITION TO GRANTING OF LEAVE TO FILE COMPLAINT

and

BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

CLAUDE CUMMINS, ET AL., *Defendants*.

OPPOSITION TO GRANTING OF LEAVE TO FILE COMPLAINT

Comes now Abraham L. Shushan, sought to be made one of the defendants in the above entitled cause, and, in response to the rule to show cause issued herein on June 9, 1941, opposes the motion of the State of Louisiana for leave to file its original complaint in this Court herein, on the following grounds, supported in the accompanying brief:

1—This Court is without jurisdiction of this cause,

a—Because the State of Louisiana is neither a real nor the proper party complainant therein;

b—Because the action involves, in any event, claims against this opponent, a citizen of Louisiana, as a necessary and indispensable party thereto.

2—This Court should decline to take jurisdiction of this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by jury.

WHEREFORE, with full reservation of any and all pleas and defenses to the proposed complaint, appearer prays that this Court deny leave to the State of Louisiana to file its original complaint in this Court herein.

BON GEASLIN,
Washington, D. C.,
Attorney for Appearer.

Washington, D. C.,
September 29, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ———, ORIGINAL.

STATE OF LOUISIANA, *Plaintiff*,

versus

CLAUDE CUMMINS, ET AL., *Defendants*.

BRIEF IN SUPPORT OF OPPOSITION.

The opposition of the proposed defendant to the application for leave to file the complaint, is based on both a want of constitutional jurisdiction of this Court to entertain such a cause, and on an alternative plea to decline to entertain the cause even though technical jurisdiction may exist.

1—This Court is Without Jurisdiction of this Cause,

a—Because the State of Louisiana is neither a real nor the proper party complainant therein.

The proposed complaint involves an action for damages representing sums of which the proposed defendants are alleged to have defrauded the Board of Levee Commissioners of the Orleans Levee District (to which reference is herein made simply as the Levee Board). It is the position of this proposed defendant that the State of Louisiana, as such, has no interest in the matter, and is neither a real nor a proper party complainant in such an action.

The Levee Board was created by Act of the Legislature of Louisiana,[1] which gave the Board all needful corporate powers, including the right to sue and be sued in its corporate name.[2] These powers were given subsequent constitutional sanction and perpetuity,[3] thus placing them beyond the authority of the legislature to alter or repeal.

The direct point as to the right of the State of Louisiana to sue on causes of action vesting in the Levee Boards of the State, was decided adversely to that contention by the Supreme Court of Louisiana in 1910.[4] The case involved an action to set aside a sale of land by one of the Levee Boards, and to obtain restitution, on the ground that the sale was a fraudulent one through collusion of members of the Board with the purchasers. The Court held that although the Levee Boards of Louisiana are agencies of the State, "no one would venture to say that the Attorney General could ignore the existence of these corporations and enforce, in the name of the State, any cause of action which any of them might have."[5]

The statute under which the proposed complaint is sought to be filed,[6] provides for a recovery "in the name of the State of Louisiana" of "any claim of the State for any" money or property fraudulently diverted "from the State".[7] In the case last cited,[8] the Supreme Court of Louisi-

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[1] Louisiana Act 93 of 1890.

[2] *Ibid.*, Section 3.

[3] "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted." Art. 16, sec. 7(a), La. Const. of 1921, as amended by Act 4 of the Ex. Sess. of 1930, adopted November 4, 1930.

[4] *State* v. *Tensas Delta Land Co.*, 126 La. 59 (1910).

[5] *Ibid.*, at p. 71.

[6] Louisiana Act 13 of 1940.

[7] Sec. 3(b). The statute also provides that the word "State" as therein used, includes "all public boards and commissions, all public corporations or authorities," etc., etc. Sec. 2.

[8] *State* v. *Tensas Delta Land Co.*, *supra*, Note 4.

ana held that such a recovery by the State, of assets given by statute to the Levee Board, would "frustrate and nullify an admittedly valid statute." In the instant case, the assets involved have been placed in the hands of the Levee Board by constitutional provision,[9] so that the legislature could not in any event deprive the Board thereof; thus giving added force to the right of the Levee Board alone—to the exclusion of any such right in the State as such—to seek judicial recovery of the assets.

Following the decision of the Supreme Court of Louisiana in the case of *State* v. *Tensas Delta Land Company, supra,* denying the right of the State to sue on a claim of one of its Levee Boards, the Louisiana legislature enacted a statute[10] authorizing the Attorney General, for and in behalf of the State, to enter proceedings involving real property "belonging to the State of Louisiana or any of its political agencies or subdivisions, whether the title to said land or real property is vested in or appears in the name of the State, or in the name of any of its political agencies or subdivisions".

After the enactment of this statute, an attempt was again made by the Attorney General of Louisiana to control, in behalf of the State as such, subsequent litigation involving the same land of the Levee Board, and the same transaction, in which the suit of the State against the Tensas Delta Land Company had theretofore been dismissed. The case reached this Court in due course, and it was held[11] that the Supreme Court of Louisiana, in the case of Tensas Delta Land Company, had settled the law to the effect that "the State was without title or beneficial interest which would enable it to maintain a suit to set aside the sale alleged to be fraudu-

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[9] Art. 16, sec. 7(e) pg. 2, La. Const. of 1921, as amended by Act 4 of the Ex. Sess. of 1930, adopted November 4, 1930.

[10] Louisiana Act 3 of the Extra Session of 1930.

[11] *United States ex rel. Louisiana* v. *Boarman*, 244 U. S. 397 (1917).

lent"; that the Levee Board remained the only proper plaintiff in such an action; and that the purpose of the statute was simply to authorize the Attorney General, under certain circumstances, to act for and on behalf, and in conjunction with, the Levee Board in such a suit.[12]

The same point was again adjudicated by the Supreme Court of Louisiana in 1927, in a case involving an action by the State, in behalf of another of the Levee Boards, against certain oil companies for the value of oil produced from land owned by the Levee Board. The Court held,[13] that while the Levee Board is a state agency, "it alone must assert its right of action"; and that even under the statute of 1910 quoted above, "the Attorney General has no right to sue for and in the name of the State on a cause or right of action possessed only by the Levee Board"; and the Court expressly approved the decision of this Court in the case of *United States ex rel. Louisiana* v. *Boarman, supra.*[14]

Similarly, the Supreme Court of Louisiana has held that a provision of the Constitution of Louisiana to the effect that "prescription shall not run against the State",[15] nevertheless "applies to any or all other public corporations or agencies", the exemption being "confined to actions brought by and in the name of the State itself".[16]

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[12] See also: *Board of Comm'rs. of Tensas Basin Levee Dist.* v. *Hardtner*, 164 La. 632 (1927).

[13] *State* v. *Standard Oil Co.*, 164 La. 334, 357 (1927).

[14] *Ibid.*, at p. 368. As late as 1930, the Supreme Court of Louisiana reiterated its approval of the foregoing doctrine, in a case involving the same Levee Board as is involved in the proposed complaint in the instant proceeding. *Board of Levee Comm'rs.* v. *Whitney Trust & Savgs. Bk.*, 171 La. 28, 35 (1930).

[15] Constitution of Louisiana, Art. 19, sec. 16.

[16] *Board of Comm'rs* v. *Toyo Kisen Kaisha*, 163 La. 865, 867 (1927). This language was quoted with express approval as to a Louisiana Levee Board, on the ground that "it is a separate entity from the State, created by the State, it is true, to accomplish certain public purposes, but is nevertheless distinct from it." *Board of Comm'rs. of Caddo Levee Dist.* v. *Pure Oil Co.*, 167 La. 801, 812 (1929). See also: *Board of Comm'rs. of Tensas Basin Levee Dist* v. *Earle*, 169 La. 565 (1929); *Board of Levee Comm'rs. of Orleans Levee Dist.* v. *Whitney Tr. & Savgs. Bk.*, 171 La. 28, 35 (1930).

The Supreme Court of Louisiana has held time and again, in situations far stronger than that involved in the proposed complaint, that the State of Louisiana is not a proper party to a proceeding in which one of its agencies is the real and only party at interest. Thus, that Court has held[17] that even though contracts for highway improvements in Louisiana must, under the law, be made in the name of the State, suits on such contracts must "be instituted by the (Louisiana Highway) Commission and not by the State."[18]

The foregoing decision was quoted with approval by the United States Circuit Court of Appeals for the Fifth Circuit, in *Louisiana Highway Commission* v. *Farnsworth*,[19] holding that the federal courts have jurisdiction over suits against the Louisiana Highway Commission, on contracts made in the name of the State of Louisiana, such suits not being against the State.

It is accordingly respectfully submitted that the real party at interest in the controversy exhibited in the proposed complaint in the instant proceeding, is not the State of Louisiana, but is the Board of Levee Commissioners of the Orleans Levee District; and the State, not being the real or a proper party complainant in the proceeding, may not invoke the original jurisdiction of this Court.[20]

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[17] *Saint* v. *Allen*, 172 La. 350, 361 (1931).

[18] See also: *Murff* v. *Louisiana Highway Comm'n.*, 140 So. (La. App.-1932) 863.

[19] 74 F (2d) (CCA 5-1935) 910, cert. den., 294 US 729.

[20] Each state could really control the original jurisdiction of this Court, if by mere legislative action authorizing suits by its political subdivisions or others to be brought in its name, it might thus effectively grant leave to file such suits as original actions in this Court, and the number of such suits might well become legion. See *New Hampshire* v. *Louisiana*, 108 U. S. 76; *Oklahoma* v. *Cook*, 304 U. S. 387.

1—This Court is Without Jurisdiction of this Cause,

b—Because the action involves alleged claims against this opponent, a citizen of Louisiana, as a necessary and indispensable party thereto.

The proposed complaint names citizens of California, New York and New Jersey (all residents of New York), along with the present opponent, a citizen and resident of Louisiana, as defendants. It is averred that the controversy is separable as to the resident of Louisiana, and that the complaint might be dismissed as to him without affecting the proceedings against the other parties.

It is submitted, in the alternative, that even though the State of Louisiana may be held to be the proper party complainant, on the face of the proposed complaint and of the prayer, the relief sought against each of the defendants, including this appearer, a citizen and resident of Louisiana, is inextricably inter-woven with that sought against each of the other defendants, judgments being sought against all of them "*in solido*", with some relief[21] sought against this opponent alone. It is respectfully submitted that under these circumstances, this appearer, although a citizen of Louisiana, is both a necessary and indispensable party to the proceedings.

This Court has had repeated occasion to hold that its original jurisdiction may not be invoked, even by a State, in a proceeding against citizens of other States, when citizens of the complainant state are indispensable or necessary parties defendant to the action.[22] *A fortiori*, this Court can have no original jurisdiction of an action by a State against one of its own citizens.

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[21] Prayer, paragraph 5.

[22] See: *Pennsylvania* v. *Quicksilver Mining Co.*, 10 Wall. (77 U. S.) 553 (1871); *New Mexico* v. *Lane*, 243 U. S. 52 (1917).

The leading decision on the point is that of *California* v. *Southern-Pacific Company*.[23] In that case, as in the subsequent decisions, the citizen of the complainant state involved, had not actually been made a party defendant. The Court simply found that a citizen of the complaining state was a necessary party defendant, and since the proceeding could not go on without such citizen, and since the inclusion of such citizen as a defendant would oust the court's jurisdiction, the proceeding had to be dismissed.

In the instant case, the citizen of the complaining state, the present opponent, is made a party defendant to the proposed complaint, and the complainant merely states that if this Court should find that it is without jurisdiction under the circumstances, the controversy should be treated as a separable one, and that portion thereof directed against the citizen of Louisiana should alone be dismissed. In *California* v. *Southern Pacific Company, supra,* this Court held that in the exercise of its original "exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal"; and that "the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction".[24]

It is not disputed that one who is not a party to an action is not technically bound by any judgment rendered therein. But as stated by this Court itself, an adjudication of a point by this Court necessarily carries such weight as in effect to adjudicate the rights of all persons, whether parties to the proceeding or not, in any subsequent litigation involving the same point, wherever such subsequent litigation might arise.

True, Mr. Justice Harlan dissented from the decision of the Court in *California* v. *Southern-Pacific Company, supra,*

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[23] 157 U. S. 229 (1895).

[24] *Ibid.*, at p. 257.

but his dissent was based rather on what he considered the fine-spun theory on which a State would be deprived of the right to invoke the original jurisdiction of the Supreme Court, simply because one of its citizens had, or might assert, some interest in the subject matter of that controversy.[25]

It is interesting to note that in a subsequent decision, this Court again dismissed such a proceeding, because citizens of the complainant state were necessary parties defendant to the action; and that Mr. Justice Harlan participated in the decision, and did not dissent therefrom.[26]

Similarly, in *Texas* v. *Interstate Commerce Commission*,[27] this Court held that if the citizenship of necessary parties to a proceeding is "such that they cannot be brought into the suit consistently with the limitations on our original jurisdiction, this does not justify us in proceeding in their absence".[28]

Finally, in *Pennsylvania* v. *West Virginia*,[29] while a majority of the Court held that certain citizens of the complainant states were not essential parties, and accordingly maintained the jurisdiction of the Court, Mr. Justice Brandeis (Mr. Justice Holmes concurring), dissented from the majority, on the express ground that since the citizens of the complainant states would not be bound by the decree in the suits, the Court should not entertain the proceeding. Here again, they felt, "it does not comport with the gravity and finality which should characterize an adjudication in the exercise of the original jurisdiction of this Court to proceed, at the instance of a State, in the absence of parties whose rights would be actually passed upon and be in effect determined, even though they might not be technically bound

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[25] *Ibid.*, at p. 263.

[26] *Minnesota* v. *Northern Sec. Co.*, 184 U. S. 199 (1902).

[27] 258 U. S. 158 (1922).

[28] *Ibid.*, at p. 163. See also: *Arizona* v. *California*, 298 U. S. 558.

[29] 262 U. S. 553 (1923).

in subsequent litigation in this, or some other tribunal".[30]

It is respectfully submitted, that the present opponent, a citizen of Louisiana, named by the State of Louisiana as a co-defendant in the proposed complaint in the instant proceeding, is a necessary and indispensable party thereto, "whose rights would be actually passed upon and be in effect determined" by any decree entered in such an action by this Court, even though he were not a party to the proceeding, and even though he would not "be technically bound in subsequent litigation in this, or some other tribunal"; and this Court accordingly lacks jurisdiction of the proposed action.

2—This Court should decline to take jurisdiction of this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by jury.

The complaint which the State of Louisiana proposes to file in this proceeding, is characterized by the State as one in equity, on a cause of action for which complainant alleges it has no adequate remedy at law, to rescind a contract, for discovery and accounting, and to avoid a multiplicity of suits. In truth and in fact, however, the ultimate relief for which the State prays in the proposed complaint, is merely a judgment for the payment of money on a cause of action arising out of rescision of contract; the amount for which recovery is sought, to be determined, under certain of the alternative pleas, by discovery and accounting.

The only multiplicity of suits averred, involves the suggestion of the State that the citizen of Louisiana can be

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[30] *Ibid.*, at p. 617. The report of the decision of *Ohio* v. *Helvering*, 292 U. S. 360, cited by counsel for the State of Louisiana, contains no indication as suggested by counsel, that citizens of the plaintiff State were joined as co-defendants in a separable controversy. All that this Court said was: "The bill alleges that the defendant Helvering is Commissioner of Internal Revenue, and that the other defendants are Collectors of Internal Revenue in the several Internal Revenue Districts of the State of Ohio." No contention was made as to jurisdiction; and this Court simply declined leave to file the complaint, since it failed to disclose a cause of action.

made a defendant in an action in that State only, whereas the other defendants can all be brought into Court only in New York; thus requiring two suits at law, instead of only one in this Court if original jurisdiction of this Court were sustained. This, despite the suggestion of the State that the suit against the citizen of Louisiana is separable, and may be dismissed without prejudice to the proceeding against the other defendants, should this Court find such dismissal necessary to sustain its original jurisdiction!

As long ago as 1886, this Court had occasion to hold that a bill praying for discovery, for rescision and cancellation of a contract, coupled with a money demand, with various alternative and additional pleas, was nevertheless an action at law, triable by jury under the Constitution. This Court held that the bill could not be maintained as a suit in equity, since "a judgment for pecuniary damages would adjust and determine all the rights of the parties, and is the only redress to which the plaintiffs, if they prove their allegations, are entitled".[31]

In a subsequent case,[32] this Court held that neither a demand for an accounting, the necessity of discovery, nor even an alleged multiplicity of suits gave rise to cause for the maintenance of a bill in equity, when the relief sought was merely a judgment for money. The equitable remedies suggested, said the Court, could all be made available incidentally in an action at law; and as to the plea of multiplicity of suits, "those persons who were guilty of the wrong, must be made parties in either court, in order to bind them. Such alleged multiplicity is not avoided in one court more than in the other."[33]

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[31] *Buzard* v. *Houston*, 119 U. S. 347, 353 (1886).

[32] *United States* v. *Bitter Root Development Co.*, 200 U. S. 451 (1906).

[33] *Ibid.*, at p. 478. Similarly, this Court has held that an action for damages arising out of a conspiracy to defraud, is justiciable at law, and not in equity, although the prayer for relief seeks discovery. *Curriden* v. *Middleton*, 232 U. S. 633 (1914). Even an action for injunction will not lie to avoid a "multiplicity of suits" when it appears that only two suits would be avoided. *Kohlhamer* v. *Smietanka*, 293 Fed. (D. C. Ill.-1917) 408.

The proposed action is accordingly simply one at law, seeking recovery of money. This was the situation in *Massachusetts* v. *Missouri*,[34] in which this Court held that to open its doors to such actions by the States "would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it". In such a situation, said this Court, it may properly withhold the exercise of the jurisdiction conferred upon it "where there is no want of another suitable forum".[35]

It must not be forgotten that any action taken by this Court becomes an important precedent for the future; and, as this Court has said, "in the matter of practice we are obliged to bear in mind, in an essential degree, the effect of every step taken in the instant case on those which may succeed it."[36]

If this Court were to permit the filing of the instant complaint, the precedent would give rise to rapidly multiplying actions of a similar nature. As recently stated by Mr. Justice Frankfurter in his dissenting opinion in *Texas* v. *Florida*:[37] "But if experience is any guide, the present decision will give momentum to kindred litigation . . . Legal doctrines have, in an odd kind of way, the faculty of self-generating extension. Therefore, in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate . . . potential abuses to which the doctrine is not unlikely to give rise".

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[34] 308 U. S. 1, 17-19 (1939).

[35] Both the federal and state courts of various local jurisdictions are available to the complainant as "suitable forums" for the proposed action. See *Ames* v. *Kansas*, 111 U. S. 449 (1884); *Delafield* v. *Illinois*, 2 Hill 159 (1841).

[36] *Washington* v. *Northern Sec. Co.*, 185 U. S. 254, 256 (1902).

[37] 306 U. S. 398, 434 (1939).

The foregoing thoughts are particularly appropriate when applied to such an action at law for the recovery of damages as is involved in the proposed complaint in the instant proceeding. As has been demonstrated, the proposed action is simply one at law seeking a recovery of money. If the Court grants leave to file the complaint, the defendants will unquestionably avail themselves of the right secured them by the Seventh Amendment to the Constitution to demand trial by jury.[38] The thought that this Court might be required to sit, in the exercise of its original jurisdiction, to preside over a jury trial, if the doctrine for which the State of Louisiana contends were given sanction, renders it "not inappropriate to indicate potential abuses to which the doctrine is not unlikely to give rise".

It is accordingly respectfully submitted that this Court should decline leave to the State of Louisiana to file its original complaint in this Court in the instant proceeding.

Respectfully submitted,

Bon Geaslin,
Washington, D. C.,
Attorney for Appearer.

Washington, D. C.,
September, 1941.

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[38] "The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury." 28 U. S. C. Sec. 343.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.——, Original

REPLY BRIEF TO OPPOSITION FILED BY DEFENDANTS CLAUDE CUMMINS, ET ALS., AND DEFENDANT ABRAHAM L. SHUSHAN.

STATE OF LOUISIANA,

Plaintiff,

vs.

CLAUDE CUMMINS, ET ALS.,

Defendant.

May It Please the Court:

STATEMENT.

At the last term, the State of Louisiana moved this Honorable Court for leave to file a complaint within its original jurisdiction, as She is entitled to do according to Article III, Section 2 of the Constitution of the United States. Attached to the motion was the bill of complaint the State proposed to file. This complaint, a bill in equity, disclosed as the gravamen of the suit, that the defendants, certain foreign corporations not authorized to do business

in Louisiana, and the directors of such corporations, citizens of states other than Louisiana, by agreeing to pay and paying a bribe of at least One Hundred Thirty Thousand Dollars ($130,000.00) to the President of the Board of Levee Commissioners of the Orleans Levee District (Levee Board), a governmental agency of the State of Louisiana, secured for a "dumy" Louisiana corporation (since dissolved) through which they operated, a fraudulent and illegal contract for public works with the Board. As a result of this contract, the defendants illegally received some Nine Hundred Four Thousand Four Hundred Fifty-Six Dollars and Forty-Two Cents ($904.456.42) of the public moneys of the State of Louisiana. The bill, joining the President of the Levee Board (Abraham L. Shushan, a citizen of Louisiana) as a defendant, but inviting the Court to strike him if it found that his presence would defeat this Court's original jurisdiction, asks that this Court exercise its equity powers to declare the contract fraudulent and to set it aside, and order the restitution of the money illegally had and received under such contract. The prayer of the bill prays for relief in many alternatives based upon quasi-contract, unjust enrichment, constructive trust and tort, prays for a declaration of the nullity of the contract, for an accounting and a discovery and for the appointment of a Master.

Upon the filing of the motion and the complaint, this Court issued a rule on June 9, 1941, ordering the defendants to show cause why the complaint of the State of Louisiana should not be filed. The defendant corporations and defendants Birch and Cummins filed one return, while the defendant Shushan filed a separate return, setting up substantially the same grounds of opposition. Essentially, the oppositions to the motion of the State of Louisiana

to file the complaint are based upon the following grounds:—

1. Defendants urge that the State of Louisiana is not properly a party to this suit.

2. Defendants urge that simply by bribing a state official they have defeated successfully the Constitutional right of the State of Louisiana to sue them civilly in the United States Supreme Court, and have by their own wrong ousted this Court from jurisdiction.

3. Defendants invite the Supreme Court to ignore the Constitutional guaranty to the States of a right to proceed originally in the Supreme Court.

I. THE STATE OF LOUISIANA IS PROPERLY THE COMPLAINANT.

The first ground upon which the motion of the State of Louisiana is opposed is, as stated in the brief filed on behalf of Cummins, Birch and the corporations, that:

> "The Court would be without original jurisdiction because the cause of action, if any, asserted in the proposed complaint is vested in the Board of Levee Commissioners of the Orleans Levee District, which is a political corporation and legal entity entirely distinct from the state."[1]

It is abundantly clear, both on reason and authority, that the Orleans Levee Board is *not* "a legal entity entirely distinct from the state". When this contention was pre-

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[1]See *Cummins Brief*, p. 5. Objection 1a filed by defendant Shushan is substantially the same, and raises the same questions. See *Shushan Brief* p. 3. They will be treated together.

viously advanced, the Louisiana Supreme Court had the following to say[2]:

> "Plaintiff's counsel have not favored us with an argument in support of this fourth objection, and it is doubtless because they shrank from the task of attempting to prove that a "levee District" created by the State as one of its functionaries charged with the duty of providing for the general welfare of the people by protecting them from inundation could, by any reasoning, be considered an association or corporation distinct from, and independent of, the State . . ."

The jurisprudence on this point has been uniform ever since.[3] The Supreme Court of the United States has clearly recognized the subordinate governmental character of Levee Boards and levee districts. In *Little v. Williams*,[4] this Court said:

> "The [Levee] district was a mere political subdivision of the State, created by the latter . . . . It was essentially a subordinate agency of the State

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[2]*Fisher v. Steele*, 39 La. Ann. 447 (1887) at p. 452,453. Dart's Louisiana General Statutes § 6869.4 provides that "All levee districts in the state of Louisiana heretofore or hereafter created, are hereby declared to be political subdivisions and agencies of the state of Louisiana, and such levee districts and the boards of commissioners thereof were created and exist and hold and enjoy lands and all rights to said lands, property and property rights in furtherance of a public purpose, and this statute is enacted as an exercise of the state's reserved police power. [La. Acts 1938, No. 76, § 1.]."

[3]*State v. Grace*, 161 La. 1038 at 1044, 109 So. 830 (1926) *State v. Capderveille*, 142 La. 11, 76 So. 327 (1917); *Atchafalaya Land Co. v. Grace*, 143 La. 637, 79 So. 173 (1918); *Atchafalaya Land Co. v. Dibert Cypress Co.* 157 La. 689,102 So. 871 (1925); *Atchafalaya Land Co. v. Williams Cypress Co.*, 146 La. 1047, 84 So. 351 (1920); *Little v. Williams*, 231 U. S. 335,34 S. Ct. 68, 58 L. Ed. 256 (1913).

[4]*Little v. Williams* 231 U. S. 335, 34 S. Ct. 68, 58 L. Ed. 256 (1913). The emphasis is added.

> for its convenience, *and can have no will contrary to the will of the State*, held its property and revenue for public purposes, *and was in all respects subject to the State's paramount authority.*"

As the Levee Board here involved is so clearly "a mere political subdivision of the State," exercising state functions, performing state duties and expending state funds, which merely because they are administered by a levee board "do not cease to be the monies of the State,"[5] it should seem obvious that the state can itself, concurrently and independently, assume the performance of the same state functions and duties, including the function of instituting and maintaining a suit for the protection of its monies. Yet, the defendants contend that the Law of Louisiana precludes the State from asserting a cause of action "arising from board affairs," and insist that the right to assert such a claim is exclusively the property of the Levee Board.[6] But this position is untenable.

The authority for the State of Louisiana to bring this suit, and the basis upon which it asserts this cause of action as one inuring to itself in its sovereign and proprietary capicity, is two fold:[7] —

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[5]See *Fisher v. Steele*, 39 La. Ann. 447,453 (1887). See also *State v. Grace*, 161 La. 1039, 109 So. 830 (1926) where the court says at 161 La. p. 1044; "The state, should it transfer the land to the [levee] district, including the mineral rights, . . . would not be parting with the property within the meaning of the constitutional section cited, but would only be placing it under the control of one its agencies for the purpose of constructing and maintaining levees. The land would, to all practical intents and purposes, still be the property of the state."

[6]See *Cummins Brief*, p. 6; *Shushan Brief*, p. 4.

[7]It is for these reasons that Article I of the Bill of Complaint states that it is "brought by and on behalf of the State of Louisiana through its Attorney General, Eugene Stanley, and through its Commission created by Act 13 of the Louisiana Legislature of 1940, represented by its Executive Counsel and Special Assistant Attorney General, James J. Morrison.

1. As an assertion and protection of the rights and interests of the State by the Attorney General as authorized by, and conformable to the duties imposed on him by, Article VII, Section 56 of the Constitution of Louisiana.

2. As an exercise of the police power and a valid re-assertion of concurrent authority, previously delegated by the principal (State of Louisiana) to the agent (Levee Board), to sue under Act 13 of 1940.[8]

1. THE AUTHORITY OF THE ATTORNEY GENERAL TO SUE ON BEHALF OF THE STATE.

Defendants rely for their contention that the State cannot sue upon a cause of action "arising out of board affairs," and that therefore this Court is without original jurisdiction, on three Louisiana Cases[9] and one case in this Court.[10] But none of these cases control the right of the State of Louisiana to assert the cause of action in the proposed complaint. They will be considered seriatim.

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[8]Commonly referred to as the "Crime Commission Act."

[9]*State v. Tensas Delta Land Co.*, 126 La. 59, 52 So. 216 (1910); *State v. Standard Oil Company*, 164 La. 334,113 So. 867 (1927); and *Saint v. Allen*, 172 La. 359, 134 So. 246 (1931). *Board v. Hardtner*, 164 La. 632, 114 So. 494 (1927), cited as illustrative, is really not in point. This was merely a mandamus proceeding to compel certain administrative officers to obey a statute requiring them to transfer the title of certain lands from the State to the Levee District, and to cancel a lease improperly made. The court said (164 La. at p. 639) "No one has any personal or private interest in this suit . . . It does not concern anyone—public official or private citizen—except to know whether the legislature intended, as the wiser public policy, that the mineral rights and forest timber on the lands . . . should belong to the levee boards and be subject to sale or other disposition by them, or should be . . . subject to sale by the officers of the state land department."

[10]*Louisiana v. Jack*, 244 U. S. 397,37 S. Ct. 605, 61 L. Ed. 1222 (1917).

State v. Tensas Delta Land Co.,[11] upon which most reliance is placed in both briefs submitted by defendants, arose in 1910. In the opinion on rehearing the Louisiana Supreme Court made it a point so say:[12]

> "*The General Assembly has the power at any time to authorize the Attorney General to institute actions for the use and benefit of the taxpayers and people of any particular levee district.* But as the General Assembly has vested the power to sue and be sued in the Board of Commissioners of the Tensas Levee District, *and has vested no such co-ordinate power in the Governor or Attorney General,* we are of the opinion that the institution of this suit in the name of the State is unauthorized."[13]

Similarly in the United States Supreme Court case, decided in 1917, which arose out of the *Tensas Delta Land Co.* case and which is heavily relied upon by both defendants, *(Louisiana v. Jack)*,[14] this Court was careful to say, through Mr. Justice Clark:

> "This decision [the Tensas Delta Land Co. case] determining the effect of the state statutes [that the state could not sue on a cause of action arising out of Levee Board affairs], where no claim of federal right was involved, is accepted as conclusive upon this court *and unless it has been modified by statute (there has been no modifying de-*

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[11]126 La. 59, 52 So. 216 (1910).

[12]126 La. 59 at p. 74.

[13]Emphasis added.

[14]244 U. S. 397, 37 S. Ct. 605, 61 L. Ed. 1222 (1917). See *Cummins Brief*, p. 9. This case is referred to in the *Shushan Brief* (pp. 5, 6) *sub. nom. United States ex rel Louisiana v. Bordman.*

cision) the application of the State to intervene and to appeal was properly denied."[15]

Since 1917, not only has the rule of the *Tensas Delta Land Co.* case has been "modified by statute" so that now the Legislature *has* "vested . . . such coordinate power in the . . . Attorney General,"[16] but there have been "modifying decisions"[17] and indeed constitutional modifications as well.[18]

a. The Constitution.

Unlike the Constitution of 1898, under which the *Tensas Delta Land Co.* case arose and was decided, the Louisiana Constitution of 1921 provides:

> "They [the Attorney General and his assistants] or one of them, shall attend to, and have charge of *all legal matters in which the State has an interest*, or to which the State is a party, *with power and authority to institute and prosecute or to intervene in any and all suits* or other proceedings, civil or criminal, as they may deem necessary *for the assertion or protection of the rights and interests of the State.*[19]

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[15]244 U. S. at p. 402.

[16]*Louisiana Act* 13 *of* 1940—the Crime Commission Act.

[17]*State v. Walmsley* 181 La. 597, 160 So. 91 (1935). *State v. Smith*, 182 La. 662, 162 So. 413, (1935).

[18]*Louisiana Constitution of* 1921, Article VII, Section 56.

[19]*Louisiana Constitution of* 1921, Article VII, Section 56. Emphasis added. Compare the corresponding article of the Constiution of 1898, Article 98, which provides merely that "There shall be an Attorney General for the State, who shall be elected by the qualified electors of the State at large every four years. He shall be learned in the law, and shall have actually resided and practiced law, as a licensed attorney, in the State, for five years preceding his election. He shall receive a salary of Five Thousand Dollars per annum, payable monthly on his own warrant. [As amended, Acts 1906, No. 30, adopted, Nov. 6, 1906]"

Can it be successfully contended that the State of Louisiana has no "interest" in the Orleans Levee Board, its "mere political subdivision", as Mr. Justice Van Devanter put it.[20] Can it in any way be said that the solvency of its Levee Board, charged with the duty of protecting its citizens from inundation from the flood-waters of the Mississippi River, is of no "interest"—of no concern to the State? In the light of the above Constitutional provision, must the state stand unconcernedly by while pillagers of its agencies enjoy the fruits of their bribery and corruption of State officials to the extent of hundreds of thousands of dollars of public monies while the Board itself makes no effort at recovery.[21] Must the State stand helplessly by and see public funds squandered by its agency with no more ability to protect them than if the squandering were done by the officers of a private corporation with whose funds it has no concern? Or is the State, under the above provisions of the Constitution, somewhat in the position of a minority stockholder, entitled to protect the corporate fund in which he has an interest against the *ultra vires* acts of the directorate? Or, more closely, in the position of a principal whose agent has been defrauded or has been unfaith-

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[20]See *supra* note 4, and text in connection therewith.

[21]Mr. Shushan, President of the Levee Board from 1929 and as the Complaint alleges (Complaint, Paragraph VII, p. 13) the official who received the bribe of $130,000.00 was first indicted by the United States on March 12, 1935 for evasion of income taxes. During the course of his trial the whole story of the bribe and conspiracy to defraud the Levee Board as set out in the Complaint was disclosed in the testimony. See *United States v. Abraham L. Shushan*, No. 18096, *United States District Court, Eastern District of Louisiana*, and transcript of testimony volumes I, II, and IV. Yet it was not until shortly before this suit was filed that any attempt was made by the Board to recover the funds here involved. In fairness to the gentlemen who are presently Commissioners of the Levee Board, it must be said that they have rendered every cooperation in pressing this matter.

ful to his trust? There can be but one answer to the above questions.

b. The Jurisprudence.

The more recent jurisprudence of Louisiana has given that answer, and in no uncertain terms. In the recent case of *State ex rel Portirie, Attorney General v. Walmsley, Mayor*,[22] the State through its Attorney General brought an injunction proceeding alleging the unconstitutionality of an Act reorganizing and providing a new method of appointment of the members of the Sewerage & Water Board of New Orleans.[23] The State alleged that "irreparable injury will be done to the State, the City of New Orleans, the property taxpayers of said city, and to certain of its bondholders" if the Sewerage & Water Board were reorganized in accordance with the Act alleged to be unconstitutional. The only evidence of any interest of the State in the action were two affidavits introduced into the record which tended to show, not that the State itself,[24] but that the ability of *State agencies* to market their bonds and obligations with agencies of the Federal Government had been adversely affected by the statute and that the Federal Emergency Administrator of Public Works had withheld an allotment of $2,570,000.00 from the Sewerage & Water

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[22]181 La. 597, 160 So. 91 (1935)

[23]*Louisiana Act 36 of the 2nd Extra Session of* 1934.

[24]The rhetorical statement in one of the affidavits that " the ability of the State to market its bonds and obligations . . . with agencies of the Federal Government . . . has been affected" can not have been accepted by the Court in view of the Constitutional provision (Art. 4, Sec. 2.) in effect since 1879 that "The Legislature shall have no power to contract or to authorize the contracting of any debt or liability on behalf of the State; or to issue bonds or other evidence of indebtedness thereof, except for the purpose of repelling invasion, or for the suppression of insurrection."

Board of New Orleans (a public corporation with power to sue and be sued).

Over the strenuous objection of defendants who, relying, as defendants herein, on the earlier jurisprudence, urged that the State could not maintain the suit without showing some pecuniary interest aside from that of the Board it sought to protect, the Louisiana Supreme Court, adopting the opinion of the trial judge, and basing their decision on the article of the Louisiana Constitution above quoted, held that

> "the state has a sufficient interest in the matters alleged in the petition to institute and prosecute this suit."[25]

In the course of their opinion in the *Walmsley* case, the Louisiana Supreme Court carefully explained that they did *not* hold in the earlier case of *Saint v. Allen*,[26] so heavily relied upon by defendants, that the Attorney General had no right to sue, in the name of the State, on "a cause of action arising from board affairs." The Court said:[27]

> "In this case (*Saint v. Allen*) no question whatever was raised as to the Attorney General's right to bring such a suit against the highway commission in order to have the matter indispute litigated, and *the sole question* decided by the Court was on the proposition whether or not the Attorney General *alone* had the right to represent state boards and agencies; and, contrary to the construction which counsel urged me to place upon

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[25] *Op. Cit Supra* note 22 at p. 603.

[26] 172 La. 350, 134 So. 246 (1931)

[27] *Op. cit supra* note 22 at p. 605. The emphasis is added.

> this case, *it is actually held* by the Supreme Court that 'Attorney General and assistants have charge of all legal matters in which [the] state, as [a] distinct entity, apart from other created entities or corporate agencies, has [an] interest.' (Constitution 1921, article 7 sec. 55, 56.)"

In other words, the Court here explains that in *Saint v. Allen* the Court merely held that the Attorney General was not the exclusive legal representative of state agencies, but that those agencies with corporate powers were authorized to employ separate counsel, and the Court specifically points out that the negative pregnant (i.e. that only the Board can sue through its special counsel, and the State cannot sue upon a Board matter through the Attorney General) is a complete non-sequitur. Indeed, here the court recognizes that the Constitution of 1921, by the incorporation of the new Article VII, Section 56, quoted above, accomplished just what the Court previously said in the *Tensas Delta Land Co.* case the General Assembly had the power to do but had not at that time done,—that is vested co-ordinate power in the Attorney General to institute suit on Board affairs to protect the interests of the State.

The court, in the *Walmsley* case, recognizes that the majority opinion in *Saint v. Allen* failed to make this co-ordinate power clear, and quotes with approval and adopts the dissenting opinion in *Saint v. Allen* with regard to the powers of the Attorney General to sue on behalf of the State, and the nature of the "interest" he is authorized to protect. The Court says,[28]

> "Obviously there can be no dispute as to the right of an Attorney General to represent the state in all litigation of a public character.

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[28] *Op. cit. supra* note 22 at p. 607.

"The Attorney General has authority to prosecute any action maintainable by the state.

"In determining this question it should be noted that pecuniary interest on the part of the state is not decisive of the matter; for the obligation it is under to promote the interest of all and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it standing in court. State v. Zachritz, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711; State v. Pacific Express Co., 80 Neb. 823, 115 N. W. 619, 18 L. R. A. (N.S.) 664."

With relation to the other case quoted from and heavily relied upon in defendants' brief i.e. *State v. Standard Oil Co.*, [29]Chief Justice O'Neill, in a concurring opinion in the *Walmsley* case, had the following to say:[30]—

"I doubt that the ruling that the Attorney General had the right to sue on behalf of the taxpayers and bondholders can be reconciled with the ruling made in *State v. Standard Oil Co.*, 164 La. 334, 113 So. 867, where it was held that the Attorney General could not sue in the name of the state on a cause of action which was vested in a legal subdivision of the state."[31]

The latest case on this subject in Louisiana is *State v.*

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[29]164 La. 334, 113 So. 867 (1927)

[30]*Op. cit supra* note 22 at p. 613. Justice Rogers, dissenting in *State v. Standard Oil Co.*, 164 La. 334, 113 So. 867 (1927) had already said (at p. 362) "and respectfully maintain that . . . [*State v. Grace*, 161 La. 1039, 109 So. 830 (1926)] . . . is in direct conflict with and, in effect, overrules the decision in *State v. Texas Delta Land co.*, referred to above."

[31]Chief Justice O'Neill also said, "I doubt that the ruling that the state has a sufficient interest to bring the suit is in accord with the rulings rendered by the court in . . . *Saint v. Allen*, 172 La. 350, 134 So. 246 (1931)." *Op. cit. supra* at p. 613.

Smith[32] in which the Supreme Court reiterated the position taken in, and cited with approval, the *Walmsley* case referred to above.

Thus it is clear that the Louisiana cases relied upon by defendants to establish that the State has no interest to sue on this claim have all been expressly overruled by the later jurisprudence, which squarely holds that

> "There can be no dispute as to the right of an Attorney General to represent the state in *all litigation of a public character* . . . that pecuniary interest on the part of the state is not decisive of the matter; for the obligation it is under to promote the interest of all *and to prevent the wrongdoing of one resulting in injury to the public welfare, is often of itself sufficient to give it standing in court.*"[33]

It would indeed be anomolous were a state which permits a mere general taxpayer to protect the state treasury by enjoining the expenditures by state officials of the gen-

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[32]182 La. 662, 162 So. 413. (1935).

[33]181 La. 597 at 607, 160 So. 91 (1935). The line of Louisiana cases cited in the brief on behalf of the defendant Shushan (p. 6) holding that the rule that "prescription does not run against the State" does not apply to levee boards, beside being irrelevant, do not help the defendant. They are all overruled by Louisiana Act 76 of 1938 which provides (§ 2) "Prescription shall not run against any levee district or against the board of commissioners of any levee district, in any civil matter, unless otherwise provided in the State Constitution." The cases referred to and which are overruled by the above statutes are *Board of Commissioners of the Caddo Levee District v. Pure Oil Co.*, 167 La. 801, 120 So. 373, (1929); *Board of Commissioners of Tensas Basin Levee District v. Earle*, 169 La. 565, 125 So. 619, (1930); *Board of Levee Commissioners of Orleans Levee District v. Whitney Trust and Savings Bank*, 171 La. 28, 129 So. 658, (1930); *Board of Commissioners of Port of New Orleans v. Toyo Kisen Kaisha*, 163 La. 865, 113 So. 127, (1927), is not in point involving a different type of state agency.

eral funds in the state treasury,[34] to deny the right of the State similarly to protect the state funds under the administration of one of its governmental agencies as claimed by defendants herein.

2. THE CRIME COMMISSION ACT

The second basis of the authority of the State of Louisiana to appear herein as complainant is by virtue of a recent Act of the Louisiana Legislature. A brief history of the Act will give a better understanding of its purposes.

One of the first official acts of the 1940 session of the Louisiana Legislature was the adoption of Act 13 of 1940, creating what is known as the "Louisiana Crime Commission." This act was adopted as a result of a series of disclosures, made in the public press almost daily for a year prior to the adoption of the Act, of the most startling and widespread instances of official misconduct and waste and theft of public funds that had ever been reported in the history of any state in the Union. These "scandals", as they were called, indicated the misuse and diversion to private persons of literally millions of dollars of public funds and property and the impoverishment of the state and the taxpayers for the benefit of a chosen few individuals, who, by virtue of their high public office and of the public trust and confidence reposed in them, were able, through illegal and unlawful machinations, to pervert their public trust and divert the public funds for their personal aggrandizement.

These "scandals" were not mere rumors. The public affairs of the State of Louisiana were so scandalous that

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[34] *Graham v. Jones*, No. 36159 of the Louisiana Supreme Court (1941) not yet reported. Compare *Frothingham v. Mellon*, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923).

the United States government assigned the Assistant Attorney General in charge of the Criminal Division to Louisiana exclusively for a period of almost six months; and the investigations of the Federal Government into the corrupt state of affairs in the State resulted in the indictment and conviction of the Ex-Governor, of the Ex-President of the State University, of an Ex-State judge, of the Ex-Commissioner of Conservation, the Ex-Commissioner of Labor, the Ex-President of the Orleans Levee Board, a number of Ex-State Senators and a large number of other state officials and private individuals doing business with the State. These federal indictments and convictions alone indicated the loss of millions of dollars to the State and showed clearly the necessity for a thorough going investigation into state affairs, and for the recovery of the sums embezzled if the State were to avoid near-brnkruptcy and a serious curtailment of its public services and functions.

With this in view, the Legislature, in the exercise both of its police and its proprietary powers, provided for the establishment of a Commission, composed of the Governor, the Executive Counsel to the Governor, and the Attorney General of Louisiana, and provided that the Commission

> "is vested with the authority, power, and duty to **institute and prosecute** . . . civil proceedings in the name of the State of Louisiana, for the recovery and return of . . . any moneys, property or things of value that may have been fraudulently, unlawfullly, or without authority appropriated, diverted, expended or disbursed by, or taken or acquired from the State."[35]
>
> "As used in this Act, the word "State"' shall mean and include . . . all of the governmental depart-

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[35] Louisiana Act 13 of 1940, section 3a.

ments . . . all public boards and commissions, all public corporations or authorities, all governmental subdivisions of the State . . ."[36]

a. The State's Right to Sue Under Act 13 of 1940.

The brief filed on behalf of defendants Cummins, Birch and the defendant corporations correctly recognizes that Act 13 of 1940 (the Crime Commission Act) changes the rule of the decisions relied on to establish that the State cannot sue on a cause of action belonging to the Levee Board,[37] but claim that (1) the Act does not authorize the State to sue in the United States Supreme Court (2) Even if authorized, the State is acting merely as a collecting agent for the Levee Board, in which case the Supreme Court has no jurisdiction.

The brief filed on behalf of defendant Shushan, on the other hand, assumes that by the mere provision in the Louisiana Constitution adopted as an amendment in 1928 to broaden the powers of the Board and to authorize a bond issue, that "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred upon said Board by law, as well as such powers as are herein granted," completely freezes the powers of the Board as of that date *"to the exclusion* of any such right in the State as such" to sue.[38] Pretermitting the irony of Mr. Shushan's present solicitude for protecting the Board against the State, such in interpretation is totally unacceptable. In the first place, the very next sentence in the amendment relied upon shows

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[36]Louisiana Act 13 of 1940 section 2.

[37]*Cummins Brief* pp. 8 and 9.

[38]*Sushan Brief*, p. 5.

conclusively that it was the intention to grant the Board *exclusive* authority *only* in connection with the construction, etc., of the project involved.[39] Moreover, Act 13 in no way attempts to deprive the Board of "any powers now conferred upon the Board by law," but merely to place the concurrent power of the State to sue to protect its proprietary rights in the Crime Commission by giving it the power to sue on behalf of the State for the recovery of embezzled public funds. This is in no sense a violation of the constitutional provision, which relates only to the powers of the Board, whose concurrent right to sue is not affected.[40] And finally, this provision must be read in conjunction with Article VII, Section 56 of the Louisiana Constitution authorizing the Attorney General to sue "to protect the rights and interests of the State."

1. The Crime Commission Act does not restrict the venue of Suits brought by the Commission.

The interpretation sought to be placed on the second paragraph of Section 3-B of the Crime Commission Act[41] by defendants, which would limit the authority of the Commission in bringing suits on behalf of the State only to

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[39]*Louisiana Constitution of* 1921, Article 7, Section 7 (a) "The Board of Levee Commissioners of the Orleans Levee District shall have and exercise all and singular the powers now conferred up said Board by law as well as such powers as are herein granted. Said Board shall have full and *exclusive* right, jurisdiction, power and authority to locate, relocate, construct, maintain and improve levees, embarkments, seawalls, jetties, breakwaters, waterbasins, and other works in relation to this project, . . ." (Emphasis added)

[40]For an instance of the Federal Government requiring concurrent suits involving its corporate agencies see 38 *Stat.* 219-220; Jud. Code §§207,208, 211; Act of Oct. 22, 1913, commented on in *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 42 Sup. Ct. 261, 66 L. Ed. 531 (1921).

[41]Louisiana Act 13 of 1940.

Baton Rouge, La., or at the domicile of the defendants, is so strained and so unusual as not to deserve serious consideration. This section merely provides[42]

> "That any suit filed under the provisions of this Act *may* be instituted in the Nineteenth Judicial District, Parish of East Baton Rouge, Baton Rouge, Louisiana, or at the domicile of the defendant, or anyone of the defendants named in such suit, at the discretion of the Commission . . ."

It is obvious that this provision is merely permissive and not limitative, and it is hardly to be assumed that the Legislature of Louisiana, meant, in such cavalier fashion, to abolish the provisions of the Louisiana Code of Practice relating to the venue affecting real estate, sheriff's bonds and what not[43] so far as the Crime Commission is concerned. By the same section for instance, the Commission is entitled to proceed by attachment, and in every other case in which a suit is instituted by attachment against a non-resident defendant, the proper venue is the Court in whose district the property is located. It is hardly possible that the Legislature intended to change the venue in such cases to Baton Rouge, where suits by the Crime Commission are involved. Moreover, this section interpreted as the defendants suggest would completely oust the jurisdiction of the Federal Courts—not only the Supreme Court of the United States, but the Federal District Courts as well. Certainly these results cannot flow from the mere permission to institute suits in the Parish of East Baton Rouge, Baton Rouge, La. Moreover, domicile so far as the United

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[42]Louisiana Act 13 of 1940, section 3b. Emphasis added.

[43]Compare, for instance *La. Code of Practice* Articles 163, 164, 165, 166, 392, 89, 1072. See also Dart, *Louisiana General Statutes* §§1895-97; 1248(d)-1249; 1933 (12), (19); 1210 etc.

States Supreme Court is concerned, is national in scope, and all of the defendants in this case are domiciled in the United States of America. It can hardly be claimed that the defendants, domiciled in the United States, are not subject to the territorial jurisdiction of the Supreme Court.

2. The State is not Acting as a Collection Agency.

It is a fundamental error to assume that suits brought in the name of the State of Louisiana, under the authority of Act 13 of 1940 are suits in which the State is acting as a mere collecting agency. The description of the Crime Commission Act already given above should, in itself, shows that the state brings suit in its sovereign capacity acting under its police powers, and to vindicate its proprietory rights. Indeed it is a matter of self-preservation. Moreover, the Act provides that the Crime Commission itself, and not the State agency involved, is

> "to receive any monies . . . in settlement of payment of claim of judgment; to deposit any monies recovered with the State Treasurer; or to use any monies so recovered to continue or further its investigations, civil suits or prosecutions and to dispose of any property or thing of value recovered as the commission deems proper."[44]

This provision of the Crime Commission Act completely repudiates any idea that the State in asserting this claim of the Levee Board is acting as an Agent of the Levee Board, because if it were then the monies recovered would be inevitably the property of the Board. Under the provisions of the Act, however, the monies recovered are not the property of the Board, but are to be deposited in the

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[44]Louisiana Act 13 of 1940, section 3b.

State Treasury, or to be used to further the investigations and affairs, not of the Levee Board, but of the Crime Commission. Hence, it is apparent that the line of authorities following *New York v. Louisiana*[45] relied upon by the defendant for supporting their position are inapplicable. Moreover, in all of the cases cited by the defendants, the State is appearing as the plaintiff, not for the purpose of protecting its sovereign or proprietary rights, but to collect the private claims of its individual citizens or to represent the economic interests of certain classes of citizens within its boundaries. The present case, quite to the contrary, presents a claim that has always been one of a public nature, involving the proprietary interests of the State, and the only question that can possibly arise is whether the State has placed this claim irrevocably beyond its power. This, it is certain, it has not done. Indeed, it is reminiscent of the languages of the Jabberwocky to claim, as the defendants do, that the principal in asserting a claim arising out of an act of the agent, is acting as an agent of the agent.

c. THE INTEREST OF THE STATE

The above resume of Louisiana authorities has clearly established that under the general law of the State of Louisiana, even independently of the Crime Commission Act, the Attorney General is authorized to assert the co-ordinate interest of the State of Louisiana in a cause of action arising from Board affairs, and that the Crime Commission Act expresely and unambiguously gives the State the power to sue thereon. Indeed the Louisiana jurisprudence and the Act probably go further in recognizing a right in the State to sue as *parens patriae* and to protect its agencies

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[45] *Infra* note 47 and text in connection therewith.

and the general interest and welfare of its people than the United States Supreme Court has gone.[46] But the interest of the State of Louisiana in asserting the cause of action herein proposed is much greater than the minimum required by the Louisiana jurisprudence, and the Crime Commission Act, and meets every test of the required interest laid down by the United States Supreme Court.

In the first place, it must be pointed out that the analogy sought to be drawn by the defendants between this case and the line of cases following *New Hampshire v. Louisiana and New York v. Louisiana*[47] is completely false. In those cases the states were asserting purely[48] or essentially[49] *private*, as distinguished from public or sovereign claims,[50] and indeed for the purpose of evading the pro-

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[46]See *Louisiana v. Texas*, 176 U. S. 1, 20 S. Ct. 251, 44 L. Ed. 347, (1899); *Oklahoma v. A. T. and S. F. Ry.*, 220 U. S. 277, 31 S. Ct. 434, 55 L. Ed. 465 (1911); and the line of cases beginning with *New Hampshire v. Louisiana*, 108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656 (1883). Compare *Missouri v. Illinois*, 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 497 (1901); *Pennsylvania v. West Virginia*, 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923).

[47]108 U. S. 76, 2 S. Ct. 176, 27 L. Ed. 656 (1883).

[48]*New Hampshire v. Louisiana* 108 U. S. 76 at 88 and 91; 2 S. Ct. 176, 27 L. Ed. 656 (1883).

[49]i. e. Claims which could and should have been set up by its citizens themselves. Thus in *Kansas v. U. S.*, 204 U. S. 331, 27 S. Ct. 388, 51 L. Ed. 510 (1907); *Oklahoma v. S. F.* 220 U. S. 277, 31 S. Ct. 434, 55 L. Ed. 465 (1911); *Louisiana v. Texas*, 176 U. S. 1, the court said at p. 22, "But in order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another."

[50]Compare *Missouri v. Illinois*, 180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 497 (1900); *Pennsylvania v. West Virginia*, 262 U. S. 544, 43 S. Ct. 636, 67 L. Ed. 1112 (1923); *Ohio v. Chattanooga Boiler and Tank Co.* 289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307 (1933).

visions of the XI Amendment to the United States Constitution. In *New Hampshire v. Louisiana*[51] the court bluntly said:

> "The real question, therefore, is . . . whether a State can allow the use of its name in such a suit for the benefit of one of its citizens . . . The evident purpose of the [XI] amendment . . . was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and, in our opinion, one State cannot create a controvery with another State, within the meaning of that term as used in the judicial clause of the Constitution, by asserting the prosecution of debts owing by the other State to its citizens."

In the instant case, quite to the contrary, the claim sued upon is, and has always been, a purely public claim in which the State has always had and exerted a real economic and sovereign interest, as the owner of the funds. As pointed out elsewhere in this brief[52] the interest of the State in the Levee Board is such that it cannot stand idly by while its agency is crippled in the finances under its administration and in its functioning by embezzlement and pillage.

Indeed, the interests of the State, as such, and those of the Levee Board, are so inextricably intermingled, so closely co-ordinated, and so interrelated, that it is impossible to tell where the one leaves off and the other begins. It has already been pointed out that the property and the funds under the administration of the Levee Board are none the

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[51] *Op. cit supra* note 46, 108 U. S. 76 at 88 and 91.

[52] See *supra* p. —— it sez.

less the property of the State, and that both have authority to sue with relation thereto.[53] In addition both the Levee Board and the State are under the obligation to build, contract for and maintain a levee system, and even when the Levee Board itself constructs levees, it must be done in cooperation with, and under the supervision of the State Board of Engineers, which is charged with the duty of providing technical advice, supervisory services and general planning to the Levee Boards of the State.[54] Aside from the taxes the Orleans Levee Board is itself authorized by the Legislature to levy, the State of Louisiana contributed $10,000.00 annually to the support of the Orleans Parish Levee Board from the General Fund of the State until 1939,[55] and the Board of State Engineers is now authorized to spend, in its discretion, up to the total amount of its General Fund for levee purposes in any Levee District.[56]

It is apparent, then, that the interest of the State in the finances and functioning of the Orleans Levee Board is direct and immediate—that to the extent that its finances and functioning are impaired the State must, through the Governor or the State Board of Engineers, assume its responsibiliities.[57] Moreover, the General Fund not otherwise appropriated, of the State Treasury stands pledged as a guarantee of a debt of the Levee Board to the Board of Commissioners of the Port of New Orleans amounting to

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[53]*Op. cit. supra* note 2.

[54]*See Dart's "Louisiana General Statutes"* sections 6741, 6846, and 6744, also *Louisiana Constitution of* 1921, Article 16, Section 7(a).

[55]Louisiana Act 102 of 1892, section 1, repealed by Louisiana Act 291 of 1938, section 1.

[56]*Op. cit. supra* note 55.

[57]This responsibility is particularly pressing on the State in view of Section 3 of Act 29 of the 2nd Extra Session of 1935 which directs the State Treasurer to reserve out of the first revenues of the Orleans Levee Board a sufficient amount to pay all principal and interest on its bonded indebtedness.

approximately one million dollars a year until 1952.[58] That the financial burden on Levee Boards is heavy and the consequent responsibility of the State to divert additional funds is immediate, is shown from the following excerpt from the current Report of the Board of State Engineers:[59]—

> "The local Levee Boards . . . have been assuming a burden which is in excess of their financial ability to carry, and, as a result in some instances, have anticipated their revenues for several years by issuing certain certificates of indebtedness to be redeemed when funds will be available
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> Moreover, some of the Levee Boards in their extremity had been forced to call upon the Board of State Engineers to cooperate by advancing money to them out of the General Engineer Fund . . .

And again it must be re-emphasized that the mere fact that the Levee Board administers state funds makes them none the less state monies. Both the State and the Board are entitled to sue to protect this fund—the Board to protect its administration, the State, its title. Hence it is immaterial whether the Louisiana Constitution has vested the administration of the funds sued for by the State in this case in the Levee Board—the title is still in the State.[60]

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[58]See Louisiana Act 29 of 2nd Extra Session of 1935, section 4.

[59]*Report of The Board of State Engineers of The State of Louisiana, From January* 1, 1938 *to January* 1, 1940. p. 35.

[60]See *Shushan Brief*, p. 5. The argument here advanced by defendant Shushan completely overlooks the fact that the ownership of the fund is in the State and the Board merely has the administration thereof, giving a coordinate right to the State and to its agency to protect the fund. It must be assumed that if the State recovers, it will not act unconstitutionally to deprive the Board of the administration of any part of the State funds it may recover. Moreover, it would seem that the Levee Board alone is entitled to raise this question and then only after the recovery is made.

The interest of the State in the claim here involved is therefore immediate and real, and properly asserted by the State in its sovereign and proprietary capacity.

This Court has many times held that a state has such an interest that it may properly represent its public institutions in this Court. In *Pennsylvania v. West Virginia*,[61] the States of Pennsylvania and Ohio sought to enjoin the enforcement of a statute of West Virginia whereby the shipment of natural gas from the latter state would be greatly curtailed. Pennsylvania and Ohio alleged that the enforcement of the statute would, among other things, subject them to irreparable injury in respect of many of their public institutions and governmental agencies which long had been and were then using this gas. To the objection that the State was not properly a party plaintiff this Court said:[62]—

> "The first question is whether the suits involve a justiciable controvery between the States in the sense of the Judiciary Article of the Constitution. We are of opinion that they do . . .
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> The attitude of the complainant States is not that of mere volunteers, attempting to vindicate the freedom of interstate commerce, or to redress purely private grievances. Each sues to protect a two-fold interest one as the proprietor of various public institutions and schools whose supply of gas will be largely curtailed or cut off by the threatened interference with the interstate current, and the other as the representative of the consuming public whose supply will be similarly affected. Both interests are threatened with serious injury."

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[61] 262 U. S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923).

[62] *Op. cit supra*, 262 U. S. at p. 591.

The same result was reached in *Missouri v. Illinois and the Sanitary Drainage District of Chicago*,[63] only in this case the State was a defendant, rather than a plaintiff, and was held properly a party to a suit involving one of its agencies. There the Court, speaking through Mr. Justice Shiras, said:[64]—

> "It is further contended, in support of the demurrer, that even if the State of Missouri be the proper party to file such a bill, yet that the proper defendant is the Sanitary District of Chicago solely, and that the State of Illinois should not have been made a party, and that, as to her, the demurrer ought to be sustained.
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> "The contention rather seems to be that, because the matters complained of in the bill proceed and will continue to proceed from the acts of the Sanitary District of Chicago, a *corporation of the State of Illinois*, it therefore follows that the State, as such, is not interested in the question, and is improperly made a party.
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> We are unable to see the force of this suggestion. The bill does not allege that the Sanitary District is acting without or in excess of lawful authority. The averment and the conceded facts are that the corporation as an egency of the State to do the very things which, according to the theory of the complainant's case, will result in the mischief to be apprehended. It is state action and its results that are complained of—thus distinguishing this case from that of *Louisiana v. Texas*, where the acts sought to be restrained were alleged to be those of officers or functionaries

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[63]180 U. S. 208, 21 S. Ct. 331, 45 L. Ed. 497 (1901).

[64]*Op. cit supro* note 63, 180 U. S. 208 at 241. Note also Pennsylvania *v. West Virginia, supra*, note 61.

proceeding in a wrongful and malevolent misapplication of the quarantine laws of Texas. *The Sanitary District of Chicago is not a private corporation, formed for purposes of private gain, but a public corporation, whose existence and operations are wholly within the control of the State.*

The object of the bill is to subject this public work to judicial supervision, upon the allegation that the method of its construction and maintenance will create a continuing nuisance, dangerous to the health of a neighboring State and its inhabitants. *Surely, in such a case, the State of Illinois would have a right to appear and traverse the allegations of the bill, and having such a right, might properly be made a party defendant."*[65]

In a case directly in point, *Ohio v. Chattanooga Boiler & Tank Co.*,[66] this court entertained an action by the State of Ohio for the protection of, and to recover money for, the industrial insurance fund administered by the Ohio Industrial Commission, a special insurance fund in the State Treasury administered for the benefit only of those entitled to participate therein. And in *Florida v. Anderson*,[67] a case presenting almost exactly the same facts, Mr. Justice Bradley, speaking for the Court, said:

"The first question which naturally presents itself is,whether the State of Florida has such an interest in the subject matter of the suit, and in the controversy respecting the same as to give it a standing in court. It is suggested that the trustees of the internal-improvement fund

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[65]Emphasis added.

[66]289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307 (1933).

[67]91 U. S. 667 at p. 675 seq., 23 L. Ed. 290 (1875). It is interesting to observe that this case was filed "on behalf of the said State and of the trustees of the internal-improvement fund of the State . . . ."

are the only parties legally interested, and that they have no right to bring an original bill in this court. To this it may be answered, in the first place, that the State has a direct interest in the subject-matter (the railroad in question) by reason of holding (as it does) the four millions of bonds which are a statutory lien upon the road. In the next place, the interest of the State in the internal-improvement fund is sufficiently direct to give it a standing in court, whenever the interests of that fund are brought before a court for inquiry.

"From the statement already made in reference to the history and characted of this fund, and the duties of the trustees in regard to it, it is apparent that the trustees are merely agents of the State, invested with the legal title of the lands for their more convenient administration; and that the State remains in every respect the beneficial proprietor, subject to the guaranties which have been made to the holders of railroad bonds secured thereby. The residuary interest in the fund belongs to the State. The fact that the trustees consist of the Governor and other executive officers, and that they are charged with the duties of drainage, reclamation, and settlement of the public lands (duties of a purely public character), shows that they are mere public agents invested with an important branch of the State administration.

"Now, to protect its interests, it is competant for the State, seeking equitable relief against citizens of another State, to file an original bill in this Court. The reference to the trustees in the bill cannot affect the jurisdiction of the Court, inasmuch as they are not the litigants before it . . ."

In view of these authorities, it is clear that the State of Louisiana is a proper party to this suit.

Both of the defendants in their briefs have resorted to the argumentum *ad terrorem*.[68] They suggest that to permit this suit would open the door of this Court "to suits arising out of the activities of any city, village, levee board or what not that a state should choose to sue for."[69] Obviously this is not so. Neither *Pennsylvania v. West Virginia, Missouri v. Illinois, Florida v. Anderson* nor *Ohio v. Chattanooga Boiler & Tank Co.* have had that effect; and Louisiana does not ask this Court to go one step beyond these prior cases. The relation of the State of Louisiana to the Levee Board is totally different from its relation to its cities, towns, villages and what nots, as we have gone to such great pains to point out in the preceding pages. The State has no co-ordinate rights in the affairs of these bodies—it does not "own" the funds and property of its municipalities as it does that of its Levee Boards. They are not created and administered to perform state functions, but only to serve local needs. This Court has already decided, in *Louisiana v. Texas*[70] and in other cases, both that a state has no standing in this Court merely as *parens patriae*, but must assert some proprietary right or show that it is affected in its sovereign or corporate capacity, and that the State must show that the injury threatened or suffered is more than merely local in character. This is clearly expressed by Mr. Justice Brown in his concurring opinion in *Louisiana v. Texas* where he says:[71]

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[68]*Cummins Brief* p. 12; *Shushan Brief* p. 13. The question of trial by jury will be considered later. See *Infra* p. 39.

[69]*Cummins Brief*, p. 12.

[70]176 U. S. 1, 20 S. Ct. 251, 44 L. Ed. 347 (1899).

[71]*Op. cit supra* 176 U. S. 1 at p. 28.

> "The controversy is not one in which the citizens of Louisiana generally can be assumed to be interested, but only the citizens of New Orleans, and it therefore seems to me that the State is not the proper party complainant."

Thus the Court is already fully protected from all the ills which the defendants predict for it, and a record of five cases of this type in the 151 years of existance of this Court presents neither a terrifying picture nor promises any likelihood of a change in the near future. To ask this Court to dismiss this case, where the proprietary interests of the State of Louisiana are so clearly involved, merely because the State fund it seeks to protect is administered through a state agency rather than by the State directly, comports neither with justice, with the Constitution, nor with the jurisprudence of this Court.

II. THE PRESENCE OF SHUSHAN, A CITIZEN OF LOUISIANA, AS DEFENDANT, DOES NOT DEFEAT THE JURISDICTION OF THE COURT

The second ground upon which the motion of the State of Louisiana is opposed is that the presence of Shushan, a citizen of Louisiana as defendant, defeats the jurisdiction of this Court.

1. The Supreme Court has Original Jurisdiction Where the Complaint Against the Citizen of the Complaining State is Separable from that Against Citizens of the Other States

It has already been pointed out that in all cases in which this Court has declined jurisdiction because a citizen of the complainant State was, or should have been joined

as a defendant, that citizen was invariably an *indespensible party* to the suit.[72] Until recently, the question of whether a State which had a separable controversy with one of its citizens could join him in a suit against citizens of other states was left completely open, both by the Constitution and by the jurisprudence of this Court. However, in the recent case of *Ohio v. Helvering*[73] this Court assumed original jurisdiction under such circumstances. In *Ohio v. Helvering* the State of Ohio invoked the original jurisdiction of this Court to enjoin the enforcement against it of federal statutes imposing taxes upon dealers in intoxicating liquors. The complaint was directed at the Commissioner of Internal Revenue and several collectors of internal revenue. A rule was directed in that case, as in this, to the defendants to show cause why such leave should not be granted. The Solicitor General of the United States urged as one of the grounds of the opposition to the rule that

> "The cause is not within the original jurisdiction of this Court, because four of the defendants are citizens of the plaintiff State."[74]

and the Court observed that "the other defendants are collectors of internal revenue in . . . the State of Ohio."[75] The Court nevertheless assumed jurisdiction of the controversy and adjudicated the validity of the tax, holding in effect that the complaint stated no cause of action and consequently denying leave to file. In view of the firmly estab-

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[72]See *Original Brief State of Louisiana*, p. 5

[73]*Ohio v. Helvering*, 292 U. S. 360, 54 S. Ct. 725, 78 L. Ed. 1307 (1934).

[74]*Op. cit supra* note 72, at p. 365.

[75]*Op cit. supra* note 72 at p. 366.

lished rule that the Supreme Court cannot assume jurisdiction not granted by the Constitution,[76] and that circumstances claimed to defeat the jurisdiction of the Court were urged upon it and rejected, it must be assumed, either that the prior jurisprudence was thereby overruled *sub silentio*, or that some distinguishing feature was present. The distinguishing feature is that in *Ohio v. Helvering* the defendant citizens of Ohio were not indispensible parties, and even had the complaint been dismissed as to them, jurisdiction would still have been retained as to the defendants not citizens of Ohio.

The reason for this rule is obvious. Where the effect of the joinder of the defendant citizen of the complaining state will be completely to oust the jurisdiction of the Supreme Court from the entire controversy, then the matter is at an end, and the Court can proceed no further. But where, as in a separable controversy, the effect is merely that a defendant will be dropped from the proceeding, and the proceeding itself will continue as to the remaining jurisdictionally unobjectionable defendants, then all of the principles and considerations so cogently and eloquently stated by Messers Justices Harlan and Brewer in their dissenting opinion in *California v. Southern Pacific Co.*[77] become fully effective. These principles are so well stated there that it will serve no good purpose simply to repeat them here. Suffice it to say that the same principles apply with equal force to the case at bar.[78]

However, out of an excess of caution, the State of

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[76]*Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803), also, *U. S. v. Yale Todd*, 13 Howard 52, 14 L. Ed. 47 (1794).

[77]*California v. Southern Pacific*, 157 U. S. 229 at p. 262, 15 S. Ct. 591, 39 L. Ed. 683. (1895).

[78]See Brief for Louisiana, pp. 4 and 5.

Louisiana has, in its complaint,[79] specifically invited this Court to dismiss the complaint as to defendant Shushan (the citizen of Louisiana) if this Court finds that to retain him as a formal party will defeat the original jurisdiction of this Court, and to proceed with the adjudication of the complaint against the other defendants, all residents of states other than Louisiana. Defendants claim, on the other hand, that the entire complaint should be dismissed because defendant Shushan is a necessary and indespensible party.[80]

It may be observed *en passant* that it is not enough that a jurisdictionally objectionable party be merely necessary to defeat the jurisdiction of this Court. He must be *indispensible.* Thus the Court, in *Minnesota v. Northern Securities Co.*[81] said:

> "They are; 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties."

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[79]Complaint, Art. III, p. 10.

[80]*Cummins Brief*, p. 12; *Shushan Brief* p. 8.

[81]*Minnesota v. Northern Securities Company*, 184 U. S. 199 at 235,236, 22 S. Ct. 308, 46 L. Ed. 499 (1902) following *Shields v. Barrow*, 17 How. 130; See also *California v. Southern Pacific Co.*, *op. cit supra*, note 77.

The Court then decided that certain jurisdictionally objectionable *"indispensible parties*, without whose presence the Court . . . cannot proceed"[82] must be joined. However in the instant case, defendant Shushan is neither necessary nor indispensible.

2. The Complaint Against Defendant Shushan Is Completely Separable and May Be Dismissed as to Him Alone.

While the brief filed on behalf of defendants Cummins, et al., avoide characterizing the defendant Shushan as "indispensible," that filed on his behalf iterates and reiterates that he is both necessary and indispensible without referring to a shred of authority to support it, and without adverting to the important difference observed by the jurisprudence between mere necessity and indispensibility.[83] The absence of authority is quite understandable. Indeed, the action by the State in joining the named defendants is not based on any theory of mutual interdependence, but on Section 20 (a) of the new Federal Rules of Practice.[84]

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[82] *Minnesota v. Northern Securities Companies, supra* note 81, at p. 247. See also *California v. Southern Pacific Co., supra*, note 77, particularly at pp. 256, 260, and 261. Also *Texas v. Interstate Commerce Commission* 258, U. S. 158, 42 S. Ct. 261, 66 L. Ed. 531 (1921). In *Pennsylvania v. West Virginia supra*, note 46, the majority decided in effect that the gas corporations were necessary, but *not* indespensable, and hence accepted jurisdiction.

[83] *Shushan Brief*, p. 8-11 and compare fn 11.

[84] Federal Rule 20 (a) . . . All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action . . . Judgment may be given . . . against one or more defendants according to their respective liabilities.

This suit is essentially one for a declaration of the nullity of a contract between the Levee Board and the Orleans Dredging Co., Inc., the "dummy corporation" of Cummins, Birch and the corporate defendants,[85] in which Shushan does not appear to have had any interest. It is difficult to see either the necessity or the indispensibility of Shushan as a party to such a suit. Based on the nullity of the contract, complainant then proceeds to pray in several alternatives in quasi-contract for the restitution of money unlawfully had and received by the corporations—i.e. for unjust enrichment.[86] Clearly Shushan is neither necessary nor indispensible to a determination of the quasi-contractual obligations and liability of the defendant corporations,[87] although he may be useful as a witness. True, Shushan, along with defendants Cummins and Birch, are alleged to be liable for the same amounts in each of these counts, but their liability is purely delictual, and sounds in tort, as "conspiring individual co-defendants," and is entirely independent of the liability of the corporations and of each other. Even Shushan admits that some relief is sought against him alone,[88] and some against the other defendants independently of Shushan on theories of constructive trust.[89]

Shushan complains that relief is sought against him "*in*

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[85]This is the first prayer for relief. See Complaint Prayer, Paragraph1, p. 23. A declaration of nullity of the contract is essential in view of Louisiana Civil Code Articles 1881, 1882, and 2221.

[86]See Complaint, Paragraph XIV a and b, XV; Prayer 2, 3, and 4.

[87]Only the person who "*receives* what is not due to him . . . obliges himself to restore it to him from whom he has unduly received it." *Louisiana Civil Code Article* 2301.

[88]*Shushan Brief*, p. 8. See Complaint Paragrph XVI, p. 22.

[89]See Complaint, Paragraph XVI, p. 22.

solido"—but this word has no connotation of inseparability; indeed it was conciously chosen for its separable connotation. The Louisiana Civil Code illustrates its meaning thus[90]

> When several persons obligate themselves to the obligee by the terms[91] in solido, or use any other expressions, which clearly show that they intend that each one shall be separately bound to preform the whole of the obligation, it is called an obligation in solido on the part of the obligors.

Indeed, the very closest defendant Shushan comes to being "indispensible" is as a joint tort-feasor, and it is too well established that they can be sued singly or in *globo* without affecting the liability of the others to require citation.[92]

California v. Southern Pacific Co.,[93] the case so heavily relied upon by defendants as authority for the dismissal of this suit because of Shushan,[94] poises the question of separability as being

> "whether other persons who have an *immediate interest* in resisting the demand of complainant are not *indispensable parties* or, at least, so far necessary that *the cause should not go on in their absence.* Can the court proceed to a decree . . . and do complete and final justice, without affect-

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[90]*Louisiana Civil Code* Article 2082.

[91]This obligation may be either contractual or *delictual*, see *Louisiana Civil Code* Article 2324.

[92]*Rowland v. Horst*, 188 Cal. 772, 297, Pac. 373 (1922) holding joint tortfeasors separable.

[93]*Op. cit. supra* note 77.

[94]It must again be pointed out here that the Court specifically held in this case that the parties were *indispensable.*

> ing other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience."[95]

What "*immediate interest*" does Shushan have in the recission of the contract; in the liability of the other defendants in tort and for unjust enrichment? How will he be affected, in his person or his property, by any decision of this or any court concerning the other defendants? Obviously, in no way. Clearly this Court can "proceed to a decree and do complete and final justice without affecting persons not before this Court" and without affecting Shushan at all.

Indeed, what defendants other than Shushan are doing here, is attempting to set up their own fraud, their own bad faith, in an attempt to deprive Louisiana of recourse to this Court. They claim that by their bribery alone they have closed the doors of the Supreme Court on Louisiana. One cannot believe that a briber can so easily control the original jurisdiction of the Supreme Court.

III. THERE IS NO BASIS UPON WHICH THIS COURT CAN REFUSE THE COMPLAINT PROPOSED BY LOUISIANA

The third ground upon which the motion of the State of Louisiana is opposed is, as stated in the brief filed on behalf of Shushan:—[96]

"This Court should decline to take jurisdiction of

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[95]*Op. cit supra* note 77 at p. 251. See also *Minnesota v. Northern Securities Company, supra*, note 81, at p. 238.

[96]*Shushan Brief*, p. 11 seq. the objection filed by *Cummins* et al is substantially the same. See *Cummins Brief*, p. 15 seq.

> this cause, because it is not a suit in equity, but is a simple action at law for an ordinary money demand, required to be tried by pury".

It should be pointed out at the outset that this is nothing more than a bald invitation to the Supreme Court to ignore the provisions of the United State Constituion. Article III, Section 2 of the Constitution specifically provides that

> "The Judicial Power shall extend to all Cases, *in Law and Equity,*

and it should make no difference whether the proposed complaint states a cause of action cognizable on either side of the Court, so long as it is within the original jurisdiction of this Court.

Defendants' anxiety to make this case appear as an action at law rather than one in equity flows from a twofold purpose, one is an attempt to terrorize the court by the prospect of a jury trial,[97] the other, an attempt to bring the case within the language used by the court in *Massachusetts v. Missouri.*[98]

While this is not the time to argue a motion for the impanelling of a jury, it should be too clear for argument that the defendants are not entitled thereto, there being no "plain, adequate and complete remedy . . . at law" as required by the Judiciary Act. The defendants strive mightily, but to no avail, to make it appear that Louisiana's complaint is a simple action at law. They have combed the

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[97] *Shushan Brief*, p. 14; *Cummins Brief*, p. 17.

[98] 308 U. S. 1, 60 S. Ct. 39, 84 L. Ed. 3 (1939).

digests to find five cases, none similar to the case at bar, in which complaints stated in equity have been held to be essentially actions at law. *Buzzard v. Houston*[99] was a case involving simple facts. The complaint was that, through fraud, the defendant had procured complainant to surrender a valuable contract and accept an assignment of a valueless one, whereby complainant was injured to the extent of $25,000.00. Although complainant in that case asked for recission, for discovery, and for other equitable relief, the Court held that "The present bill states a case for which an action of deceit could be maintained at law, and would afford full, adequate and complete relief." In *U. S. v. Bitter Root Co.*[100] no contract was involved, and the case was, as stated by the Court,

> "really nothing but an action of trespass or trover to recover damages sustained by complainant by reason of the wrongful cutting, carrying away and conversion of the property of the complainant, consisting of the timber on the land mentioned in the bill; and for the wrong thus done we think it clear that the complainant has a plain, adequate and complete remedy at law . . ."

while in *Currenden v. Middleton*,[101] Mr. Justice Holmes said

> The relief sought is simply a decree for damages . . . so that although the word restitution is used,

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[99]119 U. S. 347, 7 S. Ct. 274, 30 L. Ed. 446 (1886). The quotation appears at 119 U. S. p. 353.

[100]200 U. S. 451, 26 S. Ct. 318, 50 L. Ed. 550 (1906). The quotation appears at 200 U. S. p. 472.

[101]232 U. S. 633, at p. 636, 34 S. Ct. 458, 58 L. Ed. 765 (1913).

there is no attempt to rescind, to follow a specific fund or to establish a trust.[102]

How different is the instant case! While the State of Louisiana does not recognize equity as a separate jurisdiction,[103] the essence of this suit is, as pointed out above, for a declaration of the nullity and a recession and cancellation of the contract as required by the law of Louisiana[104] which falls within the equitable jurisdiction of this Court. The whole basis of the case is relief from the terms of a contract fraudulently procured, and one of the alternative claims seeks relief from a hard bargain.[105] Louisiana

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[102]The other two cases are relied upon by defendant simply to show that two threatened suits are not sufficient multiplicity to justify equity taking jurisdiction. But this is not the only basis for equity jurisdiction in this suit, and many more than two suits may be necessary. While all of the defendants other than Shushan are presently residing or doing business in New York, one of the corporations is domiciled in New Jersey and Cummins is domiciled in California. Moreover, *Empire Engineering Corp. v. Mack* 217 N. Y. 85 (1916) really held that an interpleader proceeding in which the amount of the fund to be deposited was in dispute defeated equity jurisdiction, and in *Kohlhamer v. Smietanka*, 239 Fed. 408 (1917), a class suit, the court held that the petitioner was not representative of the class he sought to represent.

[103]La. Civil Code Art. 21. See Franklin, *Equity in Louisiana: The Role of Article 21* [1934] 9 *Tulane L. Rev.* 485.

[104]La. Civil Code Art. 1881, 1882, 2221. It is assumed that the law of Louisiana will govern at least this aspect of the suit, in view of the fact that the contract was executed and to be performed in Louisiana, and the fraud practiced and consumated in Louisiana.

[105]See Complaint, Paragraph XV, p. 21; Prayer, 4. The language of Hamilton in *The Federalist* shows how clearly the the equitable jurisdiction of the Supreme Court applies to this aspect of the case. Mr. Hamilton says, in Federalist 80:

It has been asked, what need of the word "equity." What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject among individuals which may not involve those ingredients of FRAUD, ACCIDENT, TRUST, or HARDSHIP, which would render the matter an object of equitable rather than legal juris-

specifically claims that certain of the funds, the recovery of which she seeks, are "impressed with a trust,"[106] and the whole case against the corporations is based upon following the funds paid the Orleans Dredging Co., their "dummy corporation." Moreover the complaint clearly shows that a discovery and an accounting, not of a simple debt, but of a technical, complicated engineering project of great magnitude and involving almost a million dollars is necessary to fix the liability of defendants under certain of the demands. It seems too clear for citation of authority that such a controversy is properly one for the exercise of this Court's equitable jurisdiction, and that a jury would be of no value in the technical accounting problems involved herein.

This case being so clearly on the equity side of the Court, the language in *Massachusetts v. Missouri* is completely inapplicable.

With regard to *Massachusetts v. Missouri*, it seems that the defendants have entirely misunderstood the purport of the lanuage of Mr. Chief Justice Hughes so heavily relied upon by them. Chief Justice Hughes neither said, nor intended to say, that merely because a State invoked the original jurisdiction of the Supreme Court in an action at law, rather than in equity, for a money demand that the Court was entitled to exercise a discretion to refuse it admittance. The judiciary articles of the Constitution are too clear on this, and the original jurisdiction of this Court

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diction, as the distinction is known and established in the several States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains; these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate."

[106]See Complaint, Paragraph XVI, p. 22.

has been exercised in behalf of states suing at law on money demands too often for there to be any question of a discretionary refusal of jurisdiction. *Ohio v. Chattanooga Boiler and Tank Co.*[107] is a recent example of an original action at law which the Court accepted merely as a matter of routine.

When Mr. Chief Justice Hughes speaks of "a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume" and of "the need of the exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction in the enforcement by States of claims against citizens of other States" he speaks, not of claims traditionally justiciable at law, but of the opportunity thus afforded to States to bring before this Court, as Massachusetts in the case then under consideration attempted, controversies with citizens of other states not traditionally justiciable.

Boundary disputes, for example, are a type of controversy not traditionally justiciable over which the Supreme Court "in the exercise of a sound discretion." has accepted jurisdiction.[108] Claims, on the other hand by states against citizens of other states involving taxes imposed by a state other than that of the forum are similarly unknown to the common law and are not traditionally justiciable. The Supreme Court has already refused jurisdiction to permit suits to enforce tax penalties,[109] and *Massachusetts v. Missouri* merely indicates that the Supreme Court will exercise its discretion in permitting the use of its original juris-

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[107]289 U. S. 439, 53 S. Ct. 663, 77 L. Ed. 1307 (1933).

[108]See *Hans v. Louisiana*, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed 842 (1901) and particularly 134 U. S. 1, at p. 15.

[109]*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 S. Ct. 1370, 32 L. Ed. 239 (1897).

diction to collect traditionally nonjusticiable interstate tax claims. But to carry this principle over to those types of suits which are traditionally justiciable, and traditionally within the jurisdiction of the Court, would be to place the entire original jurisdiction of the Supreme Court at the discretion—one might almost say at the whim—of the Court, a result not justified by the language of the Constitution and certainly not contemplated by the Founding Fathers. Hamilton, for example in urging the Constitution on the people of New York, had the following to say:

> "The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has just been examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquility of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.[110]
>
> "The Supreme Court is to be invested with original jurisdiction, only "in cases affecting ambassadors, other public ministers, and consuls, and those in which *A STATE* shall be a party' . . . In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."[111]

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[110] *The Federalist*, # 80.

[111] *Op. cit supra*, # 81 Emphasis *not* added.

Luther Martin, in delivering his "Genuine Information" on the proposed Constitution to the Maryland Legislature, observed:[112]—

> "between a State and citizens of another State . . . Should any question arise between a foreign consul and any of the citizens of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the first instance to be heard in the Supreme Court, however inconvenient to the parties, and however trifling the subject of dispute".

Thus it is apparent that the language in *Massachusetts v. Missouri* relates only to a discretion with relation to the original jurisdiction of the Supreme Court in cases not cognizable at the common law. As to all others, there is vested by the third article of the Constitution a constitutional right in the various States to invoke the original jurisdiction of this Court. This is clearly expressed in *South Dakota v. North Carolina*[113], where the Court said, quoting *Cohens v. Virginia*[114],

> "In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more States, between a State and citizens of another State' . . . If these be the parties it is entirely unimportant what may be the subject of the controversy. Be it what it may, these parties have

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[112]III Farrand *"The Records of the Federal Convention"* 170 and 220.

[113]192 U. S. 286, 24 S. Ct. 269, 48 L. Ed. 448 (1903) the quotation appears at 192 U. S. p. 316.

[114]6 Wheat, 264, 406.

a constitutional right to come into the courts of the Union."

The right to invoke the original jurisdiction of the Supreme Court is a valuable and sovereign right of the States which they will not lightly surrender[115]. However, in passing, it may be pointed out that this case does not present any of the conditions set out in the above opinion for the exercies of discretion by the Court. Besides being traditionally within the Court's jurisdiction, the process of this Court is necessary for the State's protection. As pointed out above, the defendants, after plundering the State have dissolved their Louisiana corporation and withdrawn from the jurisdiction, scattering from California to New York and New Jersey. While all except Shushan are presently residing or doing business in New York, there is no assurance that they will remain to be sued. Moreover, the witnesses are as scattered, or more so, than the defendants, and the process of no court other than this can assure a complete trial of the issues involved. Under those circumtances, it is inaccurate to suggest that the courts of New York can afford adequate relief. And certainly it cannot be suggested that Louisiana is, in this proceeding, abusing its privilege of invoking the original jurisdiction of the Supreme Court. Her demand is important, her right clear, and her need great. Certainly, in view of the language of the Constitution and the Founding Fathers, this Court will not permit persons alleged to have plundered a sovereign

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[115]It is important to notice that usually the jurisdiction of international courts extends to cases by nations against the citizens of other nations. See, the Central American Court of Justice, described in de Bustamante, *The World Court* (1926), p. 68. See also the proposed Constitution, Article VI, Section 2, in Streit, *Union Now*, p. 209, and *Union Now with Britan*, p. 221.

State to maintain that, in order to sue "the State of Louisiana can . . . come to New York."[116]

CONCLUSION

Briefly stated, the State of Louisiana is complaining to this Honorable Court that the defendant foreign corporations and citizens of other states have come into the State of Louisiana and have, through bribery and by the corruption of her public officials, pillaged the public funds of one of her state agencies in which she has a direct, immediate and pecuniary interest, of almost a million dollars. That since that time they have dissolved the domestic corporation which they used as a cloak or a "dummy" behind which to operate in the State of Louisiana, have removed themselves to New York, New Jersey, California and other states, and have placed themselves completely beyond the jurisdiction of the Courts or process of Louisiana. Louisiana insists that, under such circumstances, the Constitution of the United States has, in Article III, Section 2, provided and guaranteed her a forum in which she is entitled to be heard and to press her claims for legal relief. She insists that, not only is she not forced to submit herself to the process of a sister state, but that in no other forum can she obtain the relief that can be afforded in the United States Supreme Court; that the witnesses necessary for the proof of the allegations made in the complaint are located in Louisiana, New York, New Jersey and perhaps in other states, and the process of no single state court, other than the United States Supreme Court, will be sufficient to compel their attendance. Louisiana denies that she can be ousted from her sovereign prerogative of invoking the jurisdiction of the United States Supreme Court merely

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[116]*Cummins Brief*, p. 18.

because one of her citizens was bribed by the other defendants, and participated in the pillage and enjoyed a part of the spoils realized by the non-resident defendants, and insists that the complaint against the non-resident defendants, completely separable from that against the defendant Shushan, be heard, even if it is necessary to drop the defendant Shushan from the proceedings.

The State of Louisiana therefore prays that this Honorable Court dismiss the oppositions to her motion for leave to file the proposed complaint, filed by the defendants herein, and grant the motion heretofore made by Louisiana for leave to file the proposed complaint against said defendants.

Respectfully Submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.____, Original

STATE OF LOUISIANA,

Plaintiff,

vs.

CLAUDE CUMMINS, ET AL.,

Defendant.

MOTION TO STRIKE NAMED PARTY DEFENDANT AND PETITION FOR REHEARING.

JAMES J. MORRISON,
Special Assistant Attorney General,
State of Louisiana, and Executive Counsel,
Louisiana Crime Commission.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.____, Original

STATE OF LOUISIANA,

Plaintiff,

vs.

CLAUDE CUMMINS, ET AL.,

Defendant.

MOTION TO STRIKE NAMED PARTY DEFENDANT

Now into Court comes the State of Louisiana, and moves this Honorable Court for leave to dismiss, and does hereby dismiss, from the complaint proposed to be filed herein, one of the defendants named in said proposed complaint, to wit, Abraham L. Shushan, the citizen of the State of Louisiana.

JAMES J. MORRISON,
Special Assistant Attorney General,
State of Louisiana, and Executive Counsel,
Louisiana Crime Commission.

STATE OF LOUISIANA,

Plaintiff,

vs.

CLAUDE CUMMINS, ET AL.,

Defendant.

PETITION FOR REHEARING.

The State of Louisiana now moves, that, considering the foregoing motion to strike the named defendant, Abraham L. Shushan, the citizen of the State of Louisiana from the proposed complaint, that the Court grant a rehearing herein, on the ground that the jurisdictional defect pointed out by the Court in the Per Curiam Opinion announced in this case has been cured by dismissing the defendant citizen of Louisiana, A. L. Shushan, from the proceedings, and that the Court, now having jurisdiction, should grant the original motion of the State of Louisiana for leave to file the proposed complaint, as now amended.

Wherefore, the State of Louisiana now prays that this Honorable Court grant a rehearing herein, and further grant the original motion of the State of Louisiana for leave to file the proposed complaint, as amended, in the above numbered and entitled cause, and the other relief prayed for in such original motion.

JAMES J. MORRISON,
Special Assistant Attorney General,
State of Louisiana, and Executive Counsel,
Louisiana Crime Commission.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.——, Original

STATE OF LOUISIANA,

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vs.

CLAUDE CUMMINS, ET AL.,

Defendant.

PETITION FOR REHEARING

And now into Court comes the State of Louisiana, and moves this Honorable Court to grant a rehearing herein on the ground that this Court erred in the "*per curian*" rendered in this case on October 27, 1941, because:

1. The United States Supreme Court possesses no discretion either under Article III, Section 2 of the United States Constitution, or under Section 233 of the Judicial Code, to deny Louisiana, one of the United States of America, leave to invoke the original jurisdiction of this Court under the circumstances of this case, where such original jurisdiction is otherwise properly invoked.

2. That this case is distinguishable from the case of *Massachusetts v. Missouri*, 308 U. S. 1, 19-20,

and the decision in that case is not controlling in the present case.*

3. In the alternative, and only in the event that the Court should find that *Massachusetts v. Missouri*, 308 U. S. 1, 19-20, is controlling, then the State of Louisiana asks for a reconsideration thereof, and suggests that *Massachusetts v. Missouri* is in error, and should be overruled or restricted.*

WHEREFORE, the State of Louisiana now prays that this Honorable Court grant a rehearing herein, and after full consideration, distinguish, or, and only in the alternative, overrule, *Massachusetts v. Missouri, 308 U. S. 1, 19-20*, and grant the original motion of the State of Louisiana for leave to file the proposed complaint, as amended, in the above numbered and entitled cause, and the other relief prayed for in such original motion.

The State of Louisiana further prays that the Court certify to the Attorney General of the United States, under the provisions of the Act of Congress of August 24th, 1937, Chapter 754 (50 Stat. 751), that the constitutionality of an Act of Congress, to-wit, the Judiciary Act (Judicial Code, Section 233, 28 U. S. C., § 341), being an Act affecting the public interest, is here drawn in question in a proceeding to which neither the United States, nor any agency thereof, nor any officer or employee, as such officer or employee, is a party.

And the State of Louisiana further prays that in view of the public importance of the issues to be decided, and of the sovereign nature of the States whose interests will

*See *West Coast Hotel Co. v. Parrish*, 300 U. S .379 (1937) and *cf. Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936).

be affected by the decision on this motion, that this Court exercise its discretion under Rule 33 to permit oral argument thereon.

EUGENE STANLEY,
Attorney General, State of Louisiana.

JAMES J. MORRISON,
Special Assistant Attorney General,
State of Louisiana.
Executive Counsel, Louisiana Crime Commission

CERTIFICATE

I, the undersigned counsel for the State of Louisiana, do hereby certify that this petition for rehearing is presented in good faith, and not for the purpose of delay.

JAMES J. MORRISON.

SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.——, Original

STATE OF LOUISIANA,

Plaintiff,

versus

CLAUDE CUMMINS, ET AL.,

Defendant.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

STATEMENT

The State of Louisiana filed a motion with this Honorable Court for leave to file an original complaint in the Supreme Court, within the original jurisdiction of the Supreme Court as provided for by Article III, Section 2 of the Constitution of the United States. The complaint exhibited with the motion, disclosed that the State of Louisiana sought to pursue its action against certain named individual and corporate defendants in this Court to rescind a contract alleged to have been procured by means of a fraudulent conspiracy among the defendants, with an agency of the State of Louisiana, and to recover back the money out of which the public fisc of Louisiana was alleged to have been defrauded. The Court first denied Loui-

siana leave to file the proposed complaint for want of jurisdiction, because it appeared that one of the named parties defendant was a citizen of Louisiana. Thereupon, Louisiana moved to amend its complaint and to strike the citizen of Louisiana as a defendant, and petitioned this Court for a rehearing on the ground that the jurisdictional defect noted by the Court had been cured, as all of the remaining defendants were citizens of states other than Louisiana. Thereupon this Court, on October 27, 1941, entered the following order:—

> "*Per curiam:* The motion to strike Abraham L. Shushan, the citizen of Louisiana, as a party defendant is granted. The petition for rehearing is granted. Leave to file the complaint is denied. *Massachusetts v. Missouri*, 308 U.S.1, 19-20."

Reference to *Massachusetts v. Missouri*, 308 U.S.1, at pages 19 and 20, discloses that the Court, in denying Louisiana permission to file its complaint against Cummins and others, relied upon the language in the *Missouri* case to the effect that this Court may, "in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum," and apparently concluded that New York provided a "suitable forum" in which Louisiana may pursue its complaint against the defendants, for Louisiana is not entitled to sue in any Federal Court other than the Supreme Court.[1]

It must be pointed out at the outset, that Louisiana, in the complaint that she proposes to file in this Court, is not seeking an adjudication upon any novel question of law or

[1]See *Wisconsin v. Duluth*, 2 Dill. 406, Fed. Cas. #17902 (1872) and cases there cited. See also the original jurisdiction of the District Courts, Judicial Code § 24, 28 U. S. C. § 41.

in a type of litigation not already well known to the framers of the Constitution at the time of its adoption.[2] Louisiana's is a typical case of recission of a contract for fraud in the procurement, and for the recovery back of money out of which she was defrauded—a type of action well known to the common law at least since the inception of the Court of Equity in England, and fully understood in America in 1789. It cannot be said, then, that the original jurisdiction of the Supreme Court was created without Louisiana's complaint in view.

Under the circumstances above outlined, Louisiana feels called upon to ask for a rehearing on the decision announced by the Court in its "Per curiam" in this case on October 27, 1941, because of the momentous nature of the question of fundamental constitutional law there decided, the importance of which transcends the particular controversy between Louisiana and Cummins which the Court by that decision exercised a discretion to decline to permit Louisiana to litigate before its bar. Simply stated, the question raised is as follows:—

> Does the United States Supreme Court, under Article III, Section 2 of the Constitution of the United States, and Section 233 of the Judicial Code, have an absolute discretion to refuse to permit States to invoke its original jurisdiction in a controversy with citizens of other States where such original jurisdiction is otherwise properly invoked.

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[2]The type controversy presented in *Massachusetts v. Missouri* (i. e. the effect of reciprocal statutes placing an inheritance tax on intangibles based on the domicile of the deceased) was unheard of in 1789.

Indeed, the question may properly be put more broadly, because the constitutional provision with respect to the original jurisdiction of this Court in suits by States against citizens of other States is identical with that relating to controversies between States and to cases affecting Ambassadors, other public Ministers and Consuls. The Constitution provides:

> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction."

Therefore, the basic question involved may be stated as follows:—

> Is the exercise of the entire original jurisdiction imposed upon the Supreme Court by Article III, Section 2 of the United States Constitution, and Section 233 of the Judicial Code, when properly invoked, within the absolute discretion of the Supreme Court so that the sovereigns and sovereign representatives mentioned therein invoke the original jurisdiction of this Court as a matter of grace, rather than as a matter of right?

This question must be considered not only in view of Article III, Section 2 of the Constitution, but in view of Section 233 of the Judicial Code[3] as well, which provides that,

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a

[3] 28 U. S. C. § 341.

> State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against Ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party."[4]

The Per curiam decision rendered in this case suggests that the original jurisdiction of this Court is exercised as a matter of grace, rather than as a matter of right. It is respectfully submitted that this conclusion can be supported, neither by a textual construction of the Constitution nor of the Judiciary Act, neither by an appeal to the intention of the Founding Fathers nor by the contemporaneous interpretation and understanding of the Constitution, nor by the prior jurisprudence of this Honorable Court. Indeed, measured by all of the criteria available for the interpretation of constitutional provisions, the inevitable and only conclusion is that Article III, Section 2 of the Constitution gives, and was meant to give, to the States and to the other mentioned parties, a constitutional right to invoke the original jurisdiction of the Supreme Court which, when appealed to

[4]It is, of course, obvious that an Act of Congress can neither enlarge nor restrict the original jurisdiction of the Supreme Court, *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803). The congressional purpose providing that the original jurisdiction of the Supreme Court should be "original, but not exclusive" in certain cases was to permit the parties mentioned to institute original proceedings in other courts having original jurisdiction, i. e., in State courts or in inferior Federal Courts where authorized by Congress. See Hughes, *Federal Practice Jurisdiction and Procedure* (1931), Sec. 3027; *Wisconsin v. Duluth*, 2 Dill. 406, Fed. Cas. #17902 (1872). See also *infra* note 23.

in a proper case, must hear and determine the litigation thus properly brought before it.

I. TEXTUAL CONSTRUCTION OF THE CONSTITUTION

In the first place, it must be noticed that the words of the distributive clause of the Article of the Constitution providing the judicial power are mandatory, and not permissive, thus negating any idea of the permissive or discretionary exercise of original jurisdiction by the Court, or that its exercise is a matter of grace. ". . . in those [cases] in which a State shall be Party, the Supreme Court *shall* have original jurisdiction"[5]—not "*may* have original jurisdiction." Moreover, and even more important to show that the original jurisdiction of the Supreme Court is not a matter of grace, *the very next sentence of the distributive clause of the Constitution provides for a discretionary exercise of the appellate jurisdiction of the Supreme Court.* This sentence provides[6]

> "In all other cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations, as the Congress shall make.*"

The juxtaposition of these two provisions distributing the jurisdiction of the Supreme Court shows four things conclusively—

1. That the Founding Fathers clearly had in mind a discretionary exercise of the jurisdiction of the Supreme Court.[7]

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[5]Emphasis added.
[6]Art. III, Section 2.2. Emphasis added.
[7]See discussion of deliberations of the Constitutional Convention *infra*.

2. That where it was the intention of the Constitution to create a discretionary jurisdiction of the Supreme Court it clearly and unequivocally so stated.

3. That it was the obvious intention to establish a discretion only with regard to the appellate jurisdiction of the Supreme Court.

4. That where it vested a discretionary jurisdiction, it vested the discretion, not in the Court, but in the Congress.

From this, one is irresistably driven to the conclusion that the Constitution did not intend to, and does not, make the original jurisdiction of the Supreme Court discretionary with the Court. In order to permit a discretionary exercise of original jurisdiction by the Court with textual consistency, the Constitution would have to be interpolated to read:—

> In all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction, *with such Exceptions, and under such Regulations, as the Court shall make.*

Such a drastic change in the meaning and intent of the Constitution is entirely outside the scope of what Mr. Justice Holmes so aptly called "interstitial legislation" as being within the proper provience of the judicial process. Rather is one reminded of the poignant words of President Washington where, in his *Farewell Address* he warns that

> "If, in the opinion of the people, distribution or modification of the constitutional powers be in

> any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

Consistently with the Constitution, the Congress has provided[8] that

> "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except . . . between a State and citizens of other States . . . in which latter cases it shall have original, but not exclusive, jurisdiction."

The language of this provision conferring original jurisdiction on the Supreme Court is identical with the language of the other provisions of the Judicial Code conferring original jurisdiction on the Federal District Courts in the various categories of cases.[9] Hence if it be said that this Act confers only a discretionary original jurisdiction on the Supreme Court, then the original jurisdiction of the Federal District Courts must be equally discretionary, which is patently inacceptable. Moreover, it would interpolate the Judicial Code to read:

> The Supreme Court shall have, *but need not exercise*, exclusive jurisdiction . . . etc.

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[8]Judicial Code § 233; 28 U. S. C. § 341. This is substantially the same as the provision appearing in the original Judiciary Act.

[9]*Supra* note 1.

a result certainly not to be presumed.[10] Hence if permission to invoke the original jurisdiction of the Supreme Court is actually a matter of grace with the Court, the section of the Judicial Code imposing original jurisdiction upon the Court as of right must be unconstitutional as enlarging the original jurisdiction of the Supreme Court.[11] It is the position of Louisiana, however, that Section 233 of the Judicial Code does not enlarge, but constitutionally prescribes, the original jurisdiction of the Supreme Court as imposing thereon a mandatory original jurisdiction where such jurisdiction is properly invoked by a State in a case against citizens of other States.

II. CONTEMPORANEOUS INTERPRETATION OF THE CONSTITUTION

Turning now to discover the contemporaneous understanding of the meaning of the constitutional provision here involved, it is found that the universal understanding was that the original jurisdiction of the Supreme Court should be exercised by the Court without any question of discretion or of grace entering into the discussion, though the discussion of the validity and extent of the Congressional discretion with relation to the appellate jurisdiction of the Supreme Court was great and often even acrimonious.[12] The most usual and most reliable sources from which to gather the contemporaneous understanding of the meaning of the Constitution are the following:—

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[10]The difficulties with regard to Ambassadors, etc., will be adverted to *infra*, under the title "*V. Effect of a Discretionary Original Jurisdiction.*"

[11]*Marbury v. Madison*, 1 Cranch 137 (1803).

[12]See, for instance, the debate concerning the appellate jurisdiction of the Supreme Court over facts (Hamilton, Federalist #83) and with regard to the review of State court decisions. *Cohens v. Virginia*, 6 Wheat. 264 (1821).

1. The Intention of the Founding Fathers

It can clearly be seen from the *Federalist* and from the proceedings of the Constitutional Convention that the intention of the Founding Fathers was not to place a discretionary original jurisdiction in the Supreme Court in the matters affecting the high sovereign parties who were given recourse thereto by the Constitution. Indeed, one of the plans suggested in the Convention contemplated a discretionary jurisdiction of the Court with regard to suits concerning States, but the discretion was to be assigned, not to the Court, but to Congress. However, this plan was abandoned in favor of placing an absolute original jurisdiction in the Supreme Court with regard to the high sovereign parties named, and a discretionary appellate jurisdiction in the Court in the other cases enumerated subject to a congressional discretion.[13] Hamilton, for instance had the following to say with regard to the necessity of a Federal jurisdiction in general, and of an original jurisdiction in the Supreme Court with regard to the controversies of Ambassadors, Ministers and States in particular:—

> "The power of determining causes between two States, between one State and the Citizens of another and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has just been examined. History gives us a horrid picture of the dissentions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the

[13]See Randolph's draft, as supplemented in Rutledge's handwriting, referred to in Warren, *The Making of the Constitution* (1929) 534 *et seq.* See also p. 329.

tranquility of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body.[14]

"The Supreme Court is to be invested with original jurisdiction, only 'in cases affecting ambassadors, other public ministers, and consuls, and those in which A STATE shall be a party'. Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nation to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."[15]

It can be seen from the above quotation[16] that the Founding Fathers considered Ambassadors, Ministers, Consuls and States as a unity, and, because of their character, and because of the public considerations involved, granted all on the same basis an equal privilege to invoke the original jurisdiction of the Supreme Court as a matter of right belonging to their station.

2. The State Conventions

The deliberations at the State Conventions called to ratify the proposed Constitution often give an important

[14] *The Federalist*, #80.
[15] *Op. cit. supra*, #81. Emphasis *not* added.
[16] See also the quotation immediately following from Luther Martin, also a member of the Convention.

insight into the contemporaneous understanding of the document. The following quotation is chosen because the author, Luther Martin, uses the most inconsequential illustration to high-light the extent of the original jurisdiction of the Supreme Court:[17]

> "Should any question arise between a foreign consul and any of the citizens of the United States, however remote from the seat of empire, it is to be heard before the judiciary of the general government, and in the first instance to be heard in the Supreme Court, however inconvenient to the parties, and however trifling the subject of dispute."

Certainly Luther Martin's "Genuine Information" contemplates no discretionary exercise of the original jurisdiction of the Supreme Court as a matter of grace "however trifling the subject of dispute"!

3. The Judiciary Act

It is well known that many of those who signed the Constitution were members of the first Congress, and the proceedings of this Congress in placing that instrument into operation are particularly significant as to its meaning. This is particularly true of the Judiciary Act of 1789, prepared largely by Ellsworth, putting the judiciary articles of the Constitution into effect.[18] This Act was preceded by long and careful deliberation,[19] and contains the following provision with regard to the original jurisdiction

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[17]Luther Martin, "*Genuine Information*" on the proposed Constitution to the Maryland Legislature. III Ferrand, "*The Records of the Federal Convention*" 220.

[18]See *Ames v. Kansas*, 111 U. S. 449, 463 (1884); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511 (1898) p. 517.

[19]See Gales, *Annals of Congress*, Vol. 1, p. 782, 796, 820.

of the Supreme Court, identical except for the jury-trial provision to the Act as it exists today.

> "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."

This unambiguous assignment of original jurisdiction in suits by States against citizens of other States by the first Congress to the Supreme Court, which has been preserved in substantially identical language and relied upon by the States to the present day, is totally inconsistent with a discretion in the Court to refuse to exercise original jurisditcion. If the original jurisdiction of the Supreme Court is a matter of grace, it is only because the above-quoted Act of Congress is unconstitutional.

It has already been pointed out above that Congress used the identical language in describing the extent of the jurisdiction of the Supreme Court as was used with regard to the jurisdiction of district courts. In the Judiciary Act

of 1789 the provision with regard to the district courts read[20]

> "That the district courts shall have, exclusively of the courts of the several States, cognizance[21] of all . . . "

while that regarding the Supreme Court read[22]

> "That the Supreme Court shall have exclusive jurisdiction of all . . . "

It certainly cannot be presumed that Congress intended to give the district courts a discretionary jurisdiction by this statute, and it is equally obvious that Congress intended to impose a non-discretionary original jurisdiction upon the Supreme Court as well in cases where a State is a party. At least this has been the uniform interpretation of that provision.[23]

4. Early Supreme Court Decisions

Of equal importance in discovering the contemporary understanding of the Constitution are the early decisions of the United States Supreme Court. In this respect the decision of this Court in *Chisholm v. Georgia*[24] is of the utmost importance, not for its holding,[25] but in demonstrating, not only that it never occurred to the Justices that

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[20]§§ 9, 10. As to Circuit Courts, § 11.

[21]The word "cognizance" was subsequently changed to "jurisdiction".

[22]§ 13.

[23]Perhaps a word should be said about the phrase "it shall have original, but not exclusive, jurisdiction" of suits between a State and citizens of other States. The purpose of this provision is adequately explained in *Ames v. Kansas*, 111 U. S. 449, 464 (1884) and *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 519 (1898) as giving the State—*NOT* the Court—a choice as to in which of possible available courts she shall sue. See also *supra* note 4.

[24]2 Dall. 419 (1793).

[25]See XI Amendment.

their original jurisdiction in a suit concerning a State and a citizen of another State could be discretionary and exercised as a matter of grace, but that they all assumed and acted upon the theory that when their original jurisdiction was properly invoked they must decide the case and pronounce and execute judgment, even to the extent of levying execution against a recalcitrant sovereign State. If ever a case was presented for a discretionary refusal to exercise original jurisdiction, if such discretion existed, that of Chisholm against Georgia was such a case. Arising at a time when States-Rights feeling ran high—when even the Federalist papers, of which Chief Justice Jay was co-author, had denied the jurisdiction of the Supreme Court to entertain suits against States without their consent,[26] yet the majority of the Court felt obliged under the Constitution to hear and pronounce judgment on the case. In the course of the opinion Mr. Justice Blair said[27]

> "It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution, because it would be a refusal to take cognizance of a case *where a State is a party.*"[28]

Mr. Justice Wilson observed:[29]

> "This is a case of uncommon magnitude. One of the parties to it is a STATE; certainly respectable, claiming to be a *sovereign.*
>
> 'The judicial power of the United States shall extend to controversies, between a *State* and *citi-*

[26]*Federalist Paper* #81, attributed to Hamilton.
[27]*Chisholm v. Georgia*, 2 Dall. 419 (1793) at p. 451.
[28]Emphasis *not* added.
[29]*Op. cit. supra*, p. 453, 466.

> *zens* of *another* State'. Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriate language, describe, with more precise accuracy, the cause now depending before the tribunal?"

Mr. Justice Cushing said[30]

> "The judicial power, then, is expressly extended to *controversies between a State and citizens of another State.*" When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution . . . One design of the general Government was for managing the great affairs of peace and war and the general defense, which were impossible to be conducted, with safety, by the States *separately.* Incident to these powers and for preventing controversies between foreign powers or citizens from rising to extremities and to an appeal to the sword, a national tribunal was necessary, amicably to decide them, and thus ward off such fatal, public calamity. Thus, States at home and their citizens and foreign States and their citizens, are put together without distinction upon the same footing, as far as may be, as to controversies between them. So, also, with respect to controversies between a State and citizens of another State (at home). Comparing all the clauses the remedy is reciprocal; the claim to equal justice. As controversies between State and

[30] *Op. cit. supra*, p. 467.

> State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship."[31]

Chief Justice Jay observed:[32]

> "That it is conceded that a state may appear in this Court as Plaintiff against a single citizen as Defendant; and the truth is, that the State of Georgia is at this moment prosecuting an action in this Court against two citizens of South Carolina (Georgia v. Brailsford)."

Even Mr. Justice Iredell, the lone dissenter in *Chisholm v. Georgia*, while insisting that the case did not come within the original jurisdiction of the Supreme Court, nevertheless, repudiated any idea that the Court had a discretion in permitting the exercise of its original jurisdiction. Indeed, Mr. Justice Iredell conceived, and not without authority,[33] that a discretion rested in Congress to define, within the limits of the Constitution, the limits of the original jurisdiction of the Supreme Court, and that Congress, while extending it to suits by States against citizens of other States,[34] had withheld original jurisdiction in suits against States. Mr. Justice Iredell said:[35]

> ". . . the whole business of organizing the Courts, and directing the methods of their proceedings where necessary, I conceive to be in the direction of *Congress.* If it shall be found on this occasion, or on any other, that the remedies now

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[31]Emphasis *not* added.
[32]*Op. cit. supra*, p. 473.
[33]See *supra "I. Intention of the Founding Fathers."*
[34]*I. e.*, in the Judiciary Act, now § 233 of the Judicial Code, *supra.*
[35]*Op. cit. supra* note 27, p. 433. Emphasis *not* added.

> in being are defective, for any purpose it is their duty to provide for, they no doubt will provide others. It is their duty to *legislate* so far as is necessary to carry the Constitution into effect. It is *ours* only to *judge*. . . . There is no part of the Constitution that I know of, that authorizes this Court to take up any business where they left it. . .
>
> "If therefore, this Court is to be (as I consider it) the organ of the *Constitution and the law*, not of the Constitution only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an *officina brevium*, or take any other short method of doing what the Constitution has chosen (and, in my opinion, with the most perfect propriety) should be done in another manner."

The above quotations make it perfectly clear that at least the first Supreme Bench under the Constitution did not understand their original jurisdiction in suits where a State is a party to be discretionary,[36] and indeed, where the Court exercised what Mr. Justice Iredell thought to be a discretion to enlarge their original jurisdiction, the people were prompt to repudiate the exercise thereof by the adoption of the XI. Amendment.[37]

III. JURISPRUDENCE SINCE CHISHOLM V. GEORGIA

Except so far as the sueability of a State is concerned,[38] the understanding and interpretation of the effect

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[36]See Amendment XI.

[37]See also *Oswald v. New York*, 2 Dall. 401, 402, 415 (1792); *Vanstophorst v. Maryland*, 2 Dall. 401 (1792); *Georgia v. Braislford*, 2 Dall. 402, 415 (1792); 3 Dall. 1. And see also Note, 2 Dall. 430.

[38]See Amendment XI.

of the provisions of the Constitution and of the Judiciary Act providing the original jurisdiction of the Supreme Court has remained unchanged. Indeed, it may safely be said that, until *Massachusetts v. Missouri*,[39] it had never been doubted that, upon a justiciable controversy properly presented and falling within the original jurisdiction of the Court, each of the United States, and every Ambassador, Minister and Consul was entitled, under the terms of Article III, Section 2 of the Constitution and Section 233 of the Judicial Code, to invoke the original jurisdiction of the Supreme Court and to have the controversy heard as a matter of right. Such is indisputably the basic, if sometimes inarticulate, major premise underlying the decision of every case decided by this Court from *Chisholm v. Georgia* to *Massachusetts v. Missouri*.[40] Were this not so, much effort, paper and printers' ink have been unnecessarily used in the Supreme Court Reports on frequently lengthy opinions demonstrating an absence of jurisdiction, or deciding cases that the Court was obviously loathe to decide,[41] when all of such cases could have been dismissed with a brief "Per curiam" that the Court did not choose to accept jurisdiction.[42] Quotations from cases decided during the

[39]308 U. S. 1 (1939).

[40]It will serve no useful purpose to collect all of the cases in which the original jurisdiction of the Supreme Court has been invoked. Most of them are collected in Hughes, *Federal Jurisdiction*, Chapter 68.

[41]I. e. *Oklahoma v. Cook*, 304, U. S. 387 at 396 (1937).

[42]There is almost always another forum, particularly in suits by Ambassadors, Ministers, Consuls and by States against Citizens of other States. Georgia *could* have sued the Tennessee Copper Co., in Tennessee, as certainly could Ohio have sued the Chattanooga Boiler & Tank Co. [*Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439 (1933)] Indeed, the complaint and reason for exercising equitable jurisdiction in *Florida v. Anderson*, 91 U. S. 667 (1875) was that there were too many *fori* other than the Supreme Court. So too Missouri and Wisconsin presumably *could* have enjoined the Sanitary District of Chicago in an Illinois Court [Missouri *v. Illinois*, 180 U. S. 208 (1901); *Wisconsin v. Illinois*, 281 U. S. 179 (1930)], and New York, the Passaic Valley Sewerage Commission in a New Jersey Court [*New York v. New Jersey*, 256 U. S. 296 (1921)], as the judges of state courts are bound to apply the law of the Constitution as well as Federal Judges. U. S. Constitution, Article VII., Section 2.

one hundred and sixty-one years of the Courts' existence, both on the general proposition that courts cannot decline to exercise their constitutionally imposed jurisdiction,[43] and on the specific proposition that the original jurisdiction of the Supreme Court must be exercised by the Court when properly invoked by a State as a matter of right[44] could be multiplied—only a few are set out in the margin.

Indeed, the universal long acquiescence of the Supreme Court in the mandatory nature of its original jurisdiction —and the sudden claim of a discretion therein—is similar to the sudden attack on the power of the Supreme Court to enforce its decrees against states in *Virginia v. West Virginia.*[45] What the Court said there is fully applicable here:

> "The many cases in which such controversies between States have been decided in the exercise of original jurisdiction make this truth manifest. Nor is there room for contending to the contrary

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[43]For instance, ". . . this court cannot deny its jurisdiction in a case to which it is extended by the Constitution." *Minnesota v. Hitchcock*, 185 U. S. 373, 384 (1902) See also *Cohens v. Virginia*, 6 Wall. 264, 404; Mr. Justice Blair in *Chisholm v. Georgia*, 2 Dall. 419, 451 (1793).

[44]See *United States v. Texas*, 143 U. S. 621 (1892), where the court said: "Such exclusive jurisdiction was given to this court because it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation. . . . The words, in the Constitution, 'in all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff . . . it must be conceded that a State can bring an original suit in this court against a citizen of another State. *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 287. Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court . . . are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States 'to *all* cases,' in law and equity . . . and confers upon this court original jurisdiction 'in *all* cases', 'in which a State shall be party', that is, in all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant, *as well as in all cases in which a State may, of right, institute a suit in a court of the United States.*"

[45]222 U. S. 17 (1911).

> because, in all the cases cited, the States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same. *This must be unless it can be said that because a doctrine has been universally recognized as being beyond dispute and has hence hitherto, in every case from the foundation of the Government, been accepted and applied, it has by that fact alone now become a fit subject for dispute.*

The application of the principle of *Massachusetts v. Missouri* to the case at bar does just that. It throws into dispute a fundamental constitutional principle universally recognized and acted upon since the foundation of the Government by the Congress, the Courts and all of the States, and in so doing, violates the Constitution and deprives sovereign states of their constitutionally guaranteed right to resort to the Supreme Court.

IV. THE RULE OF *MASSACHUSETTS v. MISSOURI*

1. Not Applicable To This Case

Louisiana sincerely urges, not only that *Massachusetts v. Missouri* is not applicable to its controversy with Cummins, but that *Massachusetts v. Missouri*, properly understood, is entirely consistent with the jurisprudence concerning the original jurisdiction of the Supreme Court developed in *Chisholm v. Georgia* and followed through all subsequent cases. It is the dictum in the case about a general discretionary original jurisdiction, as applied so as to deny Louisiana leave to file the complaint in the present case, that Louisiana primarily complains of. A brief survey of the scope of the original jurisdiction of the Court will serve to illustrate both the consistency of the holding

in *Massachusetts v. Missouri* with other Supreme Court cases, and with § 233 of the Judicial Code, and the inapplicability of that case to the complaint proposed to be filed by Louisiana here.

It has always been recognized that the original jurisdiction of the Supreme Court did not, and was never intended to, apply in every conceivable type of case or controversy that could arise concerning ambassadors, ministers, consuls, and those to which a Sate may properly be a party. This is obvious from the very words of the Judiciary Act of 1789, section 13 of which limits the original jurisdiction of the Supreme Court in suits concerning States to "controversies of a civil nature." Similarly, with regard to ambassadors, ministers and consuls, the jurisdiction of the Court applies, not to all conceivable suits or proceedings, but only to such

> "suits or proceedings . . . as a court of law can have or exercise consistently with the law of nations."

Moreover, the original jurisdiction of the Supreme Court extends only, by the terms of the Constitution, to "cases and controversies" understood in the technical sense explained so elaborately in *Muskrat v. United States*[46] as justiciable controversies of a judiciary nature. Finally, except in cases in which the Constitution obviously means to change the law and create a new jurisdiction, such as in cases between States, it is clear that the original jurisdiction of the Supreme Court comprehends only traditionally justiciable controversies.[47] Thus, in *Chisholm v. Georgia*, Mr. Justice Iredell says:[48]

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[46] 219 U. S. 346 (1911).
[47] See *Hans v. Louisiana*, 134 U. S. 1 (1890).
[48] 2 Dall. at p. 437.

"If therefore, no new remedy be provided . . . and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown be be alone applicable. If it could, I think it is now maintainable here. If it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the Constitution, as to the power of Congress to authorize such a one."

It is significant that when the Court exceeded, without express constitutional authority, the limits of traditionally justiciable controversies by permitting suits against States without their consent in *Chisholm v. Georgia*[49] the immediate result was an amendment to the Constitution delimiting its power. At any rate, since the adoption of the Eleventh Amendment, the Court has repeatedly held that its jurisdiction was limited to traditionally justiciable controversies—to controversies recognized and traditionally adjudicated at the Common Law.

Thus in *Cohens v. Virginia*[50] Chief Justice Marshall said:

"The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceeding clause, jurisdiction might

[49]XI Amendment.
[50]6 Wheat. 264, 399 (1821).

> be exercised in consequence of the character of the party, and an original suit might be instituted in any of the federal courts; not to those cases in which an original suit might not be instituted in a federal court. Of the last description is every case between a State and its citizens, and perhaps every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction."

while in *Wisconsin v. Pelican Ins. Co.*[51] the Court said:

> "The grant is of 'judicial power,' and was not intended to confer upon the Courts of the United States jurisdiction of a suit or prosecution by the one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

and, more recently in the case of *Massachusetts v. Mellon*,[52] the Court observed that

> "The effect of this [Art. 3, § 2] is not to confer jurisdiction upon the Court merely because a State is a party, but only where it is a party to a proceedings of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant. And it has long been recognized that the original jurisdiction of the Supreme Court does not extend to political controversies, which are traditionally non-justiciable controversies."[53]

Hence it is, that in all of the cases prior to *Massachusetts v. Missouri* in which the Supreme Court has denied

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[51] 127 U. S. 265, 289 (1888).
[52] 262 U. S. 447 (1923).
[53] *Georgia v. Stanton*, 6 Wall. 50 (1867); *Cherokee Nation v. Georgia*, 5 Pet. 16 (1831).

original jurisdiction, it has done so, not on the ground that its jurisdiction was discretionary with it, or a matter of grace, but because the proposed case was not one of a traditionally justiciable nature, and therefore did not properly fall within the grant of original jurisdiction to the Court,[54] or because it did not meet the other jurisdictional requirements set up in the Constitution.[55] On the other hand, in every case presenting a traditionally justiciable controversy, either between States, or by a State against a citizen of another State, in which the original jurisdiction of the Supreme Court has heretofore been invoked to protect the proprietary interests of the State, the Court has assumed jurisdiction and determined the case.[56]

The *holding* of the Court in *Massachusetts v. Missouri* fits precisely into this constitutionally sanctioned jurisdictional pattern, irrespective of the *language* asserting an extra-constitutional and newly-discovered discretion in the Court to exercise its original jurisdiction. The Court *held* that Massachusetts could not maintain an action in the

[54]See *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Louisiana v. Texas*, 176 U. S. 1 (1900); *Principality of Monaco v. Mississippi*, 292 U. S. 313 (1936); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265 (1888). Suits of a political nature are similarly non-justiciable. *Georgia v. Stanton*, 6 Wall. 50, 75-77 (1867); *Mississippi v. Johnson*, 4 Wall. 475 (1867), as is extradition. *Kentucky v. Dennison*, 24 How. 66 (1860). See also *Louisiana v. Texas*, 176 U. S. 1 (1900).

[55]*I. e.*, because the State instituting the suit was not the real party interest [*New York v. Louisiana, New Hampshire v. Louisiana*, 108 U. S. 76 (1883); *Oklahoma v. Cook*, 304 U. S. 387 (1937)]; because the joinder of indespensible parties would defeat jurisdiction [*New Mexico v. Lane*, 243 U. S. 52 (1917); *Pennsylvania v. Quicksilver Mining Co.*, 10 Wall. 553 (1871); *California v. Southern Pacific Co.*, 157 U. S. 229 (1895); *Minnesota v. Northern Securities Co.*, 184 U. S. 199 (1902)]; because a State's interest as *parens patriae* is not a property interest [*Louisiana v. Texas*, 176 U. S. 1 (1900)] etc.

[56]Citations will only be given to suits by States against citizens of other States. *Georgia v. Brailsford*, 2 Dall. 402, 445, 3 Dall. 1; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518 (1851); *Florida v. Anderson*, 91 U. S. 667 (1875); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U. S. 439 (1933); *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907); *Alabama v. Burr*, 115 U. S. 413 (1885); *Missouri v. Holland*, 252 U. S. 416 (1920). See also the recent case of *Texas v. Florida*, 306 U. S. 398 (1939).

United States Supreme Court against citizens of Missouri to recover inheritance taxes claimed to be due under the law of Massachusetts. This is perfectly consistent with the long line of authorities declining jurisdiction of traditionally non-justiciable controversies.[57] The Court *said* that in declining jurisdiction it was exercising a discretion to withhold its original jurisdiction. This is utterly inconsistent with the One Hundred and Sixty-One Years of the history of the Supreme Court, with the Constitution, the Judiciary Act and the jurisprudence of the Court, and is *obiter dictum* by which the Court is not bound.[58]

Massachusetts v. Missouri is consistent with the authorities declining jurisdiction of traditionally non-justiciable claims because of the well recognized principle of law that the revenue acts of a State are generally not enforceable extra-territorially.[59] Indeed, that principle had already become established in the jurisprudence of the Supreme Court in *Wisconsin v. Pelican Insurance Co.*,[60] which was full authority for the decision in *Massachusetts v. Missouri*.[61]

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[57]See *supra* note 54.

[58]See Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 399 at p. 401 on the effect of *obiter dictum*.

[59]See 3 Beale, *Conflicts of Laws* (1935) § 610.2, pp. 1635-38; *Restatement of Conflicts*, § 610; Freeze, *Extraterritorial Enforcement of Revenue Laws* [1938] 23 Wash. U. L. Q. 321. It is significant to notice that the suit in *The King of Spain v. Oliver*, 2 Wash. C. C. 429, Pet. C. C. 217, which was a suit to recover certain duties imposed by the revenue laws of Spain, was brought, not on the revenue laws themselves, but upon an alleged contract to pay them. The court found no contract, and dismissed the suit It appeared quite clearly from the evidence, however, that dutiable shipments were made.

[60]127 U. S. 265 (1888) quoted *supra*.

[61]The establishment of this principle with regard to suits by States against individuals is not affected by the cases recognizing jurisdiction in a suit between States over inheritance tax claims, i. e., *Texas v. Florida*, 306 U. S. 398 (1939). In such cases the jurisdiction of the court is justified on well recognized principles of international law.

In *Louisiana v. Cummins*, the case at bar, however, quite to the contrary, the claim is for the recission of a contract and for the recovery back by Louisiana of money out of which she alleges she was defrauded by the defendants—a claim traditionally justiciable since the Roman Law, well known and recognized at the time of the adoption of the Constitution,[62] and clearly contemplated by the judiciary articles of the Constitution as being a proper subject for the exercise of the original jurisdiction of the Supreme Court. It is therefore respectfully suggested that *Massachusetts v. Missouri* in no way controls the case at bar.

In the brief previously submitted to this Court Louisiana endeavored to point out to the Court that *Massachusetts v. Missouri* was distinguishable upon a number of other grounds—i. e., that this was a complaint in equity rather than an action at law, that the New York forum is inadequate, that Louisiana was not abusing its privilege of resorting to this Honorable Court and that the process of this Court was necessary for Louisiana's protection. Reference is made to that Brief for a discussion of those points.[63]

2 If Applicable, Then *Massachusetts v. Missouri* Should Be Overruled

In accordance with the rule of this Court announced in *West Coast Hotel Co. v. Parrish*,[64] Louisiana has included in its petition for a rehearing a prayer that *Massachusetts v. Missouri* be overruled if it is found to be con-

[62]See *The Federalist* #80, quoted in Louisiana's *Reply Brief*, p. 41, Note 105.
[63]Louisiana's Reply Brief, pp. 38 *seq.*; 42, 46.
[64]300 U. S. 379 (1937). *Cf. Morehead v. New York ex rel. Tipaldo*, 298 U. S. 587 (1936).

trolling of the decision of this Court in the instant case. The considerations upon which this suggestion that *Massachusetts v. Missouri* should be overruled, in so far as it decides that the original jurisdiction of the Supreme Court in suits by States against citizens of other States is a matter of grace to be exercised within the sound discretion of this Court, is made have all been set out above. Briefly stated, such a doctrine is repugnant to the 161 years of history of the Supreme Court, to the Constitution and laws of the United States, and to the sovereignty of the States.

Moreover, it is apparent that the doctrine announced in the *Missouri* case of a discretionary original jurisdiction is based upon a faulty analysis both of the original jurisdiction of the Supreme Court and of the well known doctrine of private international law of *forum non conveniens*.[65] The Court apparently adopted the argument of counsel on this aspect of the case as reported in 308 U. S., pp. 10-13. It will be observed that counsel constantly refers to the Court as having "read into the constitutional provision," and as having "grafted a further exception upon the exception" as restrictions on the exercise of the Court's original jurisdiction not contemplated by the Constitution. Indeed, counsel's whole argument seems to be that because, to his mind the Court has violated the Constitution a number of times in the past, the Court should violate it again to assert a discretionary original jurisdiction. But the foregoing analysis in this Brief has shown that what counsel refers to as "grafting exceptions" and "reading in" is really a consistent progressive development of constitutional principles, expressing unity within the constitutional scheme, which does not, however, permit a

[65]See Blair, *The Doctrine of Forum Non-Conveniens in Anglo-American Law* [1929] 29 Columbia L. Rev. 1.

repudiation of the whole idea of "jurisdiction" which a discretion implies. And moreover, even accepting counsel's argument as true, the *Tompkins* case dispells any idea that simply because the Court has pursued an unconstitutional course (as Mr. Justice Brandis put it) even a hundred times in the past, that it will continue to exceed its authority,[66] let alone be led into an even less constitutionally justifiable position.

Again, the assertion of a discretionary original jurisdiction seems based upon a misconception of the basis of the doctrine of *forum non conveniens.* The Harvard Law Review has aptly observed that the application of the doctrine in *Massachusetts v. Missouri* is "unusual" in that the convenience of the court, rather than of the litigants, is the criterion.[67] It should be pointed out, moreover, that this is exclusively a doctrine of private international law, and not one applicable to the *lex fori;* that it applies exclusively to cases where either all parties, or at least one, are foreigners, or where the cause of action arose beyond the jurisdiction of the Court, and where the inconvenience of being tried in a foreign court will work hardship on the parties.[68] As pointed out by a British writer on the subject:[69]

> "The court will not hold its hand unless there be, in the circumstances of the case, such hardship on the party setting up the plea as would amount to vexatiousness or oppression if the court persisted in exercising jurisdiction. The inconvenience, then, must amount to actual hardship, and this must be regarded as a condition *sine qua non* . . .

[66] *Erie Railroad Co. v. Tompkins,* 304 U. S. 64 (1937).
[67] Note [1939] 53 Harvard L. Rev. 679.
[68] See 29 Columbia L. Rev. 1.
[69] Gibb, International Law of Jurisdiction (1926) 212.

> For the general rule is that a court possessing jurisdiction must exercise it unless the reasons to the contrary are clear and cogent."

Indeed in the cases relied on by the court in *Massachusetts v. Missouri* these conditions were present. *Canada Mining Co. v. Paterson*[70] was a libel proceedings all the parties to which were citizens of Canada. *Rogers v. Guaranty Trust Co.*[71] was a proceeding in a Federal Court in New York against a New Jersey corporation and a large number of directors and shareholders, a negligible number of whom were within the jurisdiction of the Court. In both cases, the Court referred the litigants to their proper forum. In the instant case, however, the United States Supreme Court is the forum of all parties—its jurisdiction and process runs to all parties alike, and the defendants have suggested no inconvenience that they will suffer if required to proceed before the Supreme Court. Indeed, every consideration of convenience, as pointed out earlier, both for complaintant and respondent, indicates this as the proper court in which to proceed. Hence the authorities relied upon by the Court in the *Mssouri* case do not support the claim to a discretionary exercise of the Court's original jurisdiction on any hitherto recognized principle of law.

Finally, the Court in *Massachusetts v .Missouri*, and in the instant case, indicates that "there is no want of another suitable forum." But it would seem that the Constitution had pre-judged this to the contrary on the basis of well known considerations, by establishing original jurisdiction in the Supreme Court. It will be pointed out later that the only other *fori* open to Louisiana is to proceed in

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[70]285 U. S. 413 (1929).
[71]288 U. S. 123 (1932).

those of the States of New York, California and New Jersey. It is clear that

> "The object of vesting in the Courts of the United States jurisdiction of a suit by one State against the citizens of another was to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Federalist No. 80; Chief Justice Jay in *Chisholm v. Georgia*, 2 Dall. 4-19, 475, Storey on the Constitution, §§ 1638, 1682."[72]

Thus it seems that the exercise of a discretion by the Supreme Court to force Louisiana into the courts of New York completely defeats the universally recognized constitutional purpose of vesting original jurisdiction in the Supreme Court, and the provision of the Constitution itself. It is therefore respectfully suggested that *Massachusetts v. Missouri*, to this extent, be overruled.

V. THE EFFECTS OF A DISCRETIONARY ORIGINAL JURISDICTION

As pointed out by respondents[73] Mr. Justice Frankfurter recently said[74] that

> "in pricking out the lines of future development of what is new doctrine, the importance of these issues may make it not inappropriate to indicate . . . potential abuses to which the doctrine is not unlikely to give rise."

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[72] *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289 (1888).
[73] Shushan Brief, p. 13.
[74] *Texas v. Florida*, 306 U. S. 398, 434 (1939).

An immediate effect of an exercise of discretion by this Court to refuse to hear Louisiana's claim against Cummins will be to completely deprive Louisiana of any right to sue in a federal court and to force Louisiana either to sue the defendants in at least one, perhaps three,[75] State Courts, or to abandon her claim against them altogether. This is so, because Congress has not granted any inferior federal court jurisdiction of suits by States where no federal question is involved, undoubtedly on the theory that States had recourse to the Supreme Court.[76] This completely defeats the purpose of the judiciary article of the Constitution, and places sovereign states in a worse position than private citizens and creatures of states—i.e. corporations—who can in similar circumstances invoke the diversity of citizenship jurisdiction.[77] This is indeed an anamolous situation.

On the other hand, ambassadors and other public ministers, their domestics and domestic servants are sueable only in the Supreme Court.[78] A discretionary jurisdiction thus places creditors of this class of persons at the absolute mercy of the Courts' discretion for the enforcement of their claims, unless it be said that Congress can impose jurisdiction on the Supreme Court only by withdrawing it from all other courts—a left-handed method of legislation at best.

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[75]Cummins is a citizen of California; Birch of New York, and the two corporations were domiciled in New Jersey. At the time the bill was originally filed, all were residents or doing business in New York, but there is no guarantee that they will remain so conveniently grouped for purposes of suit.

[76]*Wisconsin v. Duluth*, 2 Dill. 406, Fed. Cas. #17902 (1872); Hughes, *Federal Jurisdiction*, § 3027. See *Ames v. Kansas*, 111 U. S. 449 (1884).

[77]A state is not a citizen, and hence does not come under that head of jurisdiction. *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511 (1898); *Highway Commission v. Utah Construction Co.*, 278 U. S. 194 (1929), nor can a case be removed to the Federal court for diversity. *Stone v. South Carolina*, 117 U. S. 430 (1886); *Postal Tel. Co. v. Ala.*, 155 U. S. 482 (1894).

[78]U. S. C. § 341.

Similarly, states in issuing bonds frequently waive their immunity from suit. In such case, should another state become the owner of such bonds,[79] it would be in a much less advantageous position than an individual owner, as the individual could enforce the bonds as of right in the courts of the state, while the state owner would have to depend upon the grace of the Supreme Court to permit suit to be filed, as the jurisdiction of the Supreme Court is exclusive in suits between States.[80]

Again, the purpose of the judiciary article and act, as intended by the fraimers, was to give Ambassadors, Ministers and States in bringing suits[81] a choice as to where to bring them,[82] while the effect of the Court exercising a discretion to deny jurisdiction "where there is no want of another suitable forum" is both to oust them from the federal courts and to restrict them to suits in state courts. Truly the doctrine of a discretionary original jurisdiction in the Supreme Court has made a veritable "*Through the Looking-glass*" world out of the Judiciary Articles of the Constitution. Everything works backwards! What was intended as a favor is turned into a burden. What was intended to give the parties a choice results in giving them no voice in the matter, and all of the choice to the Court. The Act that was designed to give them recourse to the federal judiciary ends up in forcing them to accept the state judiciary. And the only practical method by which Congress can vest original jurisdiction in the Supreme Court, if indeed it can at all, is by withdrawing it from every other court. Such a system can not have been the intention either

[79]See *South Dakota v. North Carolina*, 192 U. S. 286 (1904).
[80]U. S. C. § 341.
[81]Except against other states.
[82]See Hughes, *Federal Jurisdiction*, § 3027.

of the Founding Fathers, the Constitution, the Congress or the Court.

VI. CONCLUSION

Counsel regrets the length to which this brief has grown, but, in view of the importance and public nature of the issue involved, wished to place before the Court all of the considerations and all of the available material for its final decision. The right granted by the Constitution and the Judiciary Acts to the States as a part of the fundamental laws to invoke the original jurisdiction of the Supreme Court is a valuable sovereign right of all of the States. The fact that it has been exercised but sparingly does not detract, but rather enhances its importance.

This Court has said only a few months ago in the *Classic* case[83] that

> "To decide it we turn to the words of the Constitution read in their historical setting as revealing the purpose of its framers, and in search for admissable meanings of its words which, in the circumstances of their application, will effectuate those purposes."

Much of the material set out above has been in an effort to discover the purpose of the framers. It seems to be abundantly clear that it was their purpose to impose a mandatory original jurisdiction on the Supreme Court in the instances enumerated. And when the judiciary provisions are read in their historical setting, with the notes of the Convention, the speeches in the State legislatures, the writing of the Federalist and the decisions of the early

[83] *United States v. Classic*, 61 Sup. Ct. 1031, 1039 (1941).

Court in view, any doubt that such jurisdiction was mandatory disappears. Indeed, it does not appear that any responsible person even suggested a discretionary original jurisdiction in the Court before *Massachusetts v. Missouri*, although, as pointed out, there was some question of placing a discretion in Congress.

At this point it may be well to call the attention of the Court to the impressions of a keen observer of American institutions on the original jurisdiction of this Court. The celebrated de Tocqueville observed that[84]

> "When the two parties [before the Supreme Court] are not private individuals, but States, an important political consideration is added . . . The quality of the parties, in this case, gives a national importance to all their disputes; and the most trifling litigation of the states may be said to involve the peace of the whole Union."

Such were the motives that prompted the Founding Fathers to give States recourse to the original jurisdiction of the highest and most respected Court of the Union in the first instance—the peace of the whole Union. Indeed, there is a not inconsiderable opinion that the original jurisdiction of the Supreme Court is already too restricted by narrow interpretation adequately to serve the purposes of the framers,[85] and there is question as to whether matters of great public concern, such as the constitutional propriety of the method of regulation of the bituminous coal resources of the Nation, may not better and more fully be presented to the Court by States representing the public

[84] *Democracy in America* (Reeves Transl. 1877) vol. 1, chap. 8, p. 15.
[85] Heady, *Suits by States within the Original Jurisdiction of the Supreme Court* [1940] 26 Wash. U. L. Q. 61.

interest, than by questionable "controversies" between private litigants such as Mr. Carter against Mr. Carter's Coal Co.[86] But even so, it would be tragedy were the Court, through the medium of "discretion," to brush this responsibility completely aside for "considerations of convenience, efficiency and justice" to clear the docket of the Court for the appellate cases of mere private litigants.

Respectfully submitted,

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[86]See *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936) and *cf. Pennsylvania v. West Virginia*, 262 U. S. 553 (1923). See Hamilton and Adair, *The Power to Govern* (1933). Chapter 1, See also 50 Stat. 751 providing for at least some public representation in private litigation involving the constitutionality of legislation of public interest.

No. —, original. LOUISIANA *v.* CUMMINS ET AL. On motion for leave to file complaint. October 20, 1941. *Per Curiam:* Leave to file the complaint is denied for want of jurisdiction, it appearing that one of the named parties defendant is a citizen of Louisiana. *California* v. *Southern Pacific Co.*, 157 U. S. 229, 256–262; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199, 238; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 163. The rule to show cause is discharged. *Messrs. Eugene Stanley*, Attorney General of Louisiana, and *James J. Morrison* for plaintiff. *Messrs. Roger Siddall* and *Eberhard P. Deutsch* for Claude Cummins et al., and *Mr. Bon Geaslin* for Abraham L. Shushan, defendants.